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Supreme Court, U.S.
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No. 04-723

In The

Supreme Court of the United States

STEVEDORING SERVICES OF AMERICA;
and HOMEPORT INSURANCE CO.,

Petitioners,

v.

AREL PRICE; Director, Office of Workers' Compensation Programs, U.S. DEPARTMENT OF LABOR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Ninth Circuit's "75 percent rule," which uses § 10(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 910(a), to compute an average weekly wage in claims filed under the Act, improperly restrict the application of § 10(c), which must be used when § 10(a) "cannot reasonably and fairly be applied?"

2. When a partially disabled employee who becomes permanently and totally disabled by a subsequent injury receives concurrent awards of compensation, do § 6(b)(1) and § 8(a) of the Act, 33 U.S.C. § 906(b)(1) and § 908(a), limit the aggregate compensation payable for disability to a sum not greater than the amount that would be payable if the employee had become totally disabled by a single injury?

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Eagle Pacific Insurance Company was a party in the court of appeals.

RULE 29.6 STATEMENT

Stevedoring Services of America (now SSA-MARINE, Inc.) and Homeport Insurance Company are privately held corporations. No publicly held company owns more than 10 percent of either company's stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Stevedoring Services of America and Homeport Insurance Company (collectively, "SSA") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 382 F.3d 878 (CA9 2004). (App. 1-27) The Ninth Circuit affirmed in part and reversed in part a decision of the Benefits Review Board, U. S. Department of Labor, which is reported at 36 BRBS 56 (2002). (*Id.* 28-48)

JURISDICTION

The judgment of the Ninth Circuit and its orders denying panel rehearing and *en banc* rehearing were entered on August 27, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Sections 6(b)(1), 8(a), 8(c)(21), 10(a), and 10(c) of the Longshore and Harbor Workers' Compensation Act ("LHWCA" or "the Act"), 33 U.S.C. § 906(b)(1), § 908(a), § 908(c)(21), § 910(a), and § 910(c), are involved in this case. The text is set out in the Appendix at pages 49-51.

STATEMENT OF THE CASE

1. Statutory Overview.

The LHWCA, 44 Stat. 1437, as amended, 33 U.S.C. § 901 *et seq.*, is a "comprehensive scheme" to compensate workers engaged in maritime employment, or their survivors and beneficiaries, for disability or death resulting from injuries on the "navigable waters of the United States" as extended by § 903(a). *Metropolitan Stevedore Co. v. Rambo (Rambo I)*, 515 U.S. 291, 294 (1995). Its "fundamental purpose" is to compensate employees or their beneficiaries for "wage-earning capacity lost because of injury," within statutory limits. *Id.* at 298. Congress did not intend to provide "complete compensation for the wage earner's economic loss. . . . Even those in the most favored categories [of disability compensation] may recover only two-thirds of the actual loss of earnings." *Potomac Electric Power Co. v. Director, OWCP (PEPCO)*, 449 U.S. 268, 281-82 (1980).

In cases of injury to "unscheduled" body parts, the Act provides for permanent partial disability compensation at 33 U.S.C. § 908(c)(21). *See Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 154-56 (1993). Back injuries are "unscheduled," because the back is not explicitly included in the "schedule" set out in § 908(c)(1)-(20). *Long v. Director, OWCP*, 767 F.2d 1578, 1580-81 (CA9 1985). Compensation is payable under § 908(c)(21) during the continuance of the disability at the rate of two-thirds of "the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter." *See Bath Iron Works Corp.*, 506 U.S. at 155-56. The LHWCA defines "disability" in economic terms at § 902(10): "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in

the same or any other employment . . ." *See Metropolitan Stevedore Co. v. Rambo (Rambo II)*, 521 U.S. 121, 126-27 (1997).

Compensation is computed, and may be recomputed on modification, so as to assure "accuracy . . . in compensating a worker for the actual economic effects of his injury, and in charging the employer and his insurer for that amount alone." *Rambo II*, 521 U.S. at 133. Thus, when an injured employee's post-injury earnings equal or exceed pre-injury earnings, but there is a "significant possibility" that the employee's earning capacity may decline in the future on account of the injury, the definition of "disability," § 902(10), and the provisions of § 908(h) permit an award of "nominal" compensation for the purpose of keeping open the employee's right under § 922 to seek modification of the compensation award on grounds including a "change in conditions." *Rambo II*, 521 U.S. at 128-30; *Rambo I*, 515 U.S. at 296-98.

Compensation for permanent total disability is "determined in accordance with the facts" in most cases, 33 U.S.C. § 908(a), and is payable "during the continuance of such total disability." The rate is two-thirds of the employee's average weekly wage. However, § 906(b)(1) establishes a maximum compensation rate in all cases: "Compensation for disability or death . . . shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage."[1]

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[1] Under § 910(f), an employee's permanent total disability compensation rate is increased annually by the percentage change in the national average weekly wage. For a table showing the annual changes since 1972, *see*:

(Continued on following page)

In most cases, an injured employee's average weekly wage is determined under 33 U.S.C. § 910(a), (b), or (c). Section 910(a) applies if the employee has worked in the at-injury employment "during substantially the whole of the year immediately preceding [the] injury." An "average daily wage" is computed from the previous year's earnings and multiplied by either 260 or 300, depending on whether the employee is a "five-day worker" or a "six-day worker." The same formula applies under § 910(b) in cases where the employee has not worked substantially the whole of the year preceding the injury, except that the formula is applied to the earnings of an employee "of the same class" who did work substantially the whole of the year. Section 910(c) applies if the formulae of § 910(a) and (b) "cannot reasonably and fairly be applied." In such cases, the employee's previous earnings in the same or other employment, including self-employment, or the earnings of similarly situated employees, are utilized to compute average annual earnings that "shall reasonably represent the annual earning capacity of the injured employee."

In every case, the employee's average annual earnings are divided by 52 under 33 U.S.C. § 910(d)(1) to arrive at an average weekly wage.

2. Facts Material to the Questions Presented.

Arel Price injured his low back in 1979 when he fell from a ladder. Following surgery, he returned to work as a longshoreman, but was restricted to light jobs as a sling man and gang boss, which he obtained through his union's

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http://www.dol.gov/esa/owcp/dlhwc/NAWWinfo.htm (last visited November 22, 2004).

hiring hall. (App. 6, 29-30) He claimed compensation under the LHWCA. An administrative law judge found that his average weekly wage was $627.88 and that he had lost wage-earning capacity of $294.01 per week. Price was awarded two-thirds of that amount, $196.01, under § 908(c)(21) as compensation for "unscheduled" permanent partial disability. (*Id.* 6)

Price reinjured his low back in 1991 when a lashing chain fell on him. (App. 6, 30) He underwent cervical surgery and a second low-back procedure, following which he again returned to restricted work as a sling man and gang boss. (*Id.* 30)

His back pain gradually increased. He started taking increased amounts of pain medication in 1996. He stopped working on July 2, 1998, based on medical advice that he should retire. (App. 6-7, 30) He claimed compensation under the LHWCA for permanent partial disability resulting from the 1991 injury and, against SSA, for permanent total disability based on his increasing back pain through July 2, 1998. (*Id.* 29, 33, 39)

3. The Decisions Below.

Both claims proceeded to hearing. The administrative law judge denied Price's claim for permanent partial disability, held that his work after the 1991 injury independently aggravated his back condition so that SSA was responsible for compensation and medical benefits, and

awarded Price compensation for permanent total disability under § 908(a). (App. 30-31, 32-33, 46-47)[2]

The administrative law judge determined that Price's average weekly wage was $1,156.15, *i.e.*, 1/52 of his wages of $60,119.97 during the 52 weeks ending July 2, 1998. That was the correct computation under § 910(c). However, the administrative law judge stated that he was applying § 910(a). Under that formula, Price's average weekly wage as a "five-day worker" was $1,525.90, computed as follows:

$60,119.97	Price's actual earnings
÷ 197	Days Price actually worked
$ 305.18	Price's average daily wage
x 260	Five-day worker multiplier
$79,346.80	"Theoretical wage approximation"[3]
÷ 52	§ 910(d)(1) divisor
$ 1,525.90	§ 910(a) average weekly wage

(App. 7, 9, 45)

The administrative law judge also found that the increase in Price's average weekly wage from $627.88 in 1979 to $1,156.15 (or $1,525.90) in 1998 "was not the result of an increase in wage-earning capacity." There was, consequently, no basis for modifying Price's permanent partial disability award. *See Rambo I*, 515 U.S. at 298. Instead, the administrative law judge reduced SSA's

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[2] Eagle Pacific was the insurance carrier at the time of Price's 1991 injury. Its responsibility turned on whether Price's work after 1991 aggravated his back. (App. 31) The Ninth Circuit concluded the responsibility issue adversely to SSA by an unpublished memorandum disposition. (*Id.* 8)

[3] *See Ingalls Shipbuilding, Inc. v. Wooley*, 204 F.3d 616, 618 (CA5 2000) (so characterizing § 910(a) computations).

compensation liability by $196.01 per week as a credit for that award, so that Price's concurrent awards for permanent partial and permanent total disability would not exceed his permanent total disability rate under § 908(a), two-thirds of his 1998 average weekly wage. (App. 19-20, 46)

SSA and Price both appealed to the Benefits Review Board under LHWCA, 33 U.S.C. § 921(a), (b)(3). The Board affirmed the administrative law judge's use of § 910(a) as appropriate under the Ninth Circuit's "75 percent rule," which was first announced in *Matulic v. Director, OWCP (Matulic)*, 154 F.3d 1052 (CA9 1998), and modified his computation to reflect the actual § 910(a) figure, $1,525.90. (App. 41-45) The Board affirmed the credit of $196.01 per week for Price's permanent partial disability award, holding that the concurrent awards could not exceed 66⅔ percent of Price's average weekly wage as of July 2, 1998. (*Id.* 45-46) In light of its modification of Price's average weekly wage, the Board additionally held that his combined compensation entitlement could not exceed the maximum compensation rate then applicable under § 906(b)(1). (*Id.* 47)[4]

SSA and Price appealed to the Ninth Circuit, which had jurisdiction under LHWCA, 33 U.S.C. § 921(c). The court affirmed the Board's conclusion that § 910(a) controls the determination of Price's average weekly wage (App. 9-10), reaffirming its "75 percent rule" in response to SSA's contention that the finding that Price's earning capacity did not increase after his 1979 injury compels application of § 910(c) and precludes a "75 percent rule"

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[4] *See* note 1, above.

computation of an average weekly wage in excess of his actual earnings:

> "In *Matulic* we announced a bright line rule that 'when a claimant works more than 75% of the workdays of the measuring year the presumption that § 910(a) applies is not rebutted.' 154 F.3d at 1058. Here, the ALJ found that Price worked 197 days during the 52 weeks preceding his 1998 total disability. Because Price is a five-day worker, there are 260 total working days in the measuring year. 33 U.S.C. § 910(a). That means Price worked 75.77 percent of the measuring year (197 divided by 260). Price falls near the line that *Matulic* drew but clearly within it. Therefore, calculating Price's 1998 average weekly wage under § 910(a) 'falls well within the realm of theoretical or actual "overcompensation" that Congress contemplated,' and the presumption that § 910(a) applies is unrebutted. *Matulic*, 154 F.3d at 1058."
>
> (App. 11)

The court limited its decision in *Marshall v. Andrew F. Mahony Co. (Marshall)*, 56 F.2d 74 (CA9 1932), which applied § 910(c), to cases where the claimant's employment is subject to "fixed, determinable periods of inactivity" and held that, by that standard, the administrative law judge's finding that Price's employment was not "intermittent and casual" was supported by substantial evidence. (*Id.* 11-12)

The court reversed the Board's application of § 908(a) and § 906(b)(1). The court held that § 908(a) forbids "double dipping," which it defined as compensation for "a loss of earning capacity that is accounted for in another award." (App. 13) However, the court concluded that Price would have been earning higher wages in 1998 but for his

injury in 1979, so his permanent partial and permanent total compensation awards did not overlap, and the weekly credit of $196.01 was improper. (*Id.* 13-17) The court understood the uncontested finding that Price's earning capacity had not increased since his 1979 injury to support its conclusion. (*Id.* 20) Regarding § 906(b)(1), the court looked to § 908 and § 919(f), which like § 906(b)(1) include the phrase "compensation for disability," and concluded that because compensation is payable for more than one kind of disability – temporary partial, temporary total, permanent partial, and permanent total – the maximum compensation rate applies separately to each award to an employee, not to all awards combined. (*Id.* 21-23)

REASONS FOR GRANTING THE WRIT

1. The "75 Percent Rule."

A. The Ninth Circuit's Decision Conflicts with the Decisions of at Least Two Other Judicial Circuits.

The "75 percent rule" is the law only in the Ninth Circuit. It *compels* triers of fact to use the § 910(a) formula to compute the average weekly wage of an employee who worked as few as 195 days in the year preceding injury: 260 x .75 = 195. That is the case, as the decision below establishes, even when it is undisputed that the employee's actual earning capacity is less than the figure derived by using the formula. Under the Ninth Circuit's rule, a trier of fact is forbidden to use § 910(c) to find, on the facts of the specific case, that the § 910(a) formula cannot "reasonably and fairly" be applied. (App. 11)

In a "75 percent rule" case, the employee's average weekly wage is an artificial construct that can be as much as one-third in excess of his or her actual earnings.[5] Price's own case approaches that extreme: as the Ninth Circuit itself observed, he worked 197 days – 75.77 percent of a five-day worker's work days – in the year preceding his injury. (App. 11) Thus, application of the § 910(a) formula to his earnings increased the actual figure, $60,119.97, by $19,226.83, to $79,346.80. Price's 196th and 197th days of work each "earned" him $9,613.41 in additional, theoretical § 910(a) wages.

The District of Columbia Circuit and the Seventh Circuit apply § 910(a) and (c) differently. There is no "75 percent rule" in those circuits. They would not use § 910(a) on the facts of Price's case.

The District of Columbia Circuit considers § 910 as a whole and gives weight to all of its parts "in the light of the general aims and objects of the statute taken as a whole." In that circuit, when the claimant's actual wage earning capacity is known, § 910(c) applies because it is "unfair and inequitable" to compensate for disability on the basis of a higher "theoretical wage earning capacity." *Johnson v. Britton (Johnson)*, 110 U.S.App.D.C. 164, 166-67, 290 F.2d 355, 357-58, *cert. denied*, 368 U.S. 859 (1961). Because § 910(c) must be used when § 910(a) or (b) cannot "*reasonably and fairly* be applied," not merely when those sections *do* not apply, there is no statutory mandate to "force the transaction into the formulae which those

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[5] And perhaps even more. *See Matulic*, 154 F.3d at 1058 ("We do not mean to suggest that a figure that is 75% or lower will necessarily result in the application of § 910(c).").

subdivisions prescribe." 110 U.S.App.D.C. at 167-68, 290 F.2d at 358-59, quoting *Marshall*, 56 F.2d at 78.

In *Strand v. Hansen Seaway Service*, 614 F.2d 572, 574-75 (CA7 1980), the Seventh Circuit followed *Marshall* and applied § 910(c) in a case where the claimant "worked thirty-six weeks (or 252 days)" of the year preceding his injury, because employment in his port was seasonal. The effect was to reduce the claimant's average weekly wage from $261.70 to $229.84. *Id.* As the dissenting judge in *Matulic* observed, the claimant had worked "84% of [the] preceding year," considered in six-day work weeks. *See Matulic*, 154 F.3d at 1061 (dissent).

The Fifth Circuit is unlikely to follow the "75 percent rule," because it uses § 910(c), not § 910(a), to address the specific problem that gave rise to the rule in *Matulic* – the employee's wages during the year preceding the injury were abnormally low and therefore unrepresentative of his pre-injury earning capacity. *See Matulic*, 154 F.3d at 1055, 1058. In *New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028, 1031 (CA5 1997), the court applied § 910(c) to minimize the effect of such a dip in the claimant's earnings by using more than one year's previous earnings to compute his average weekly wage, resulting in a figure more representative of his earning capacity.

The conflicts of interpretation that the "75 percent rule" creates call for resolution by this Court, because the LHWCA was enacted specifically to create a uniform federal workers' compensation law for maritime employees in an area where the states could not legislate constitutionally. *See Crowell v. Benson,* 285 U.S. 22, 39 (1932). The Ninth Circuit's decisions in *Matulic* and this case improperly undermine uniformity in maritime law. *Compare*

Hanson v. Marine Terminals Corp., 307 F.3d 1139, 1142-43 (CA9 2002).

B. The Inter-Circuit Conflict Will Affect Large Numbers of Claims Under the LHWCA.

The impact of the "75 percent rule" on the national LHWCA compensation system is significant. Covered employers within the Ninth Circuit's jurisdiction are subject to the rule. Covered employers in other circuits are not. The Ninth Circuit's rule has the potential to affect nearly one-third of the claims filed under the Act and its extensions: 29.8 percent of the claims filed in federal Fiscal Year 2003 and 29.7 percent in the first three quarters of Fiscal Year 2004 arose within the court's jurisdiction.[6] The potentially broad reach of the "75 percent rule," now definitively approved by the Ninth Circuit in this case, justifies this Court's review. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 474 (1992).

C. The "75 Percent Rule" Is Inconsistent with *Rambo II*.

In *Matulic*, the Ninth Circuit rejected the employer's argument that it was unfair to use the § 910(a) formula, which inflated the claimant's average weekly wage 18 percent above his actual earnings, because

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[6] *See* letter dated September 22, 2004, from Michael Niss, Director, Division of Longshore and Harbor Workers' Compensation, U. S. Department of Labor. (App. 52-53) The compensation districts referred to in the letter are based in San Francisco, Seattle, Honolulu, and Long Beach, California, respectively; *see*

http://www.dol.gov/esa/contacts/owcp/sfc/9sfls2.htm (last visited November 22, 2004).

"some 'overcompensation' is built into the system institutionally." *Matulic*, 154 F.3d at 1057. The court's decision in this case affirms a compensation order that inflates Price's average weekly wage 32 percent above his actual earnings. (App. 11)

Rambo II rejects the Ninth Circuit's key premise of "built-in overcompensation." There is no such policy.

This Court holds that the policy of the LHWCA is to favor *accuracy* over finality – the latter a characteristic of tort law – in compensating injured employees for lost earning capacity. *Rambo II*, 521 U.S. at 132-33. The specific concern in *Rambo II* was to preserve modification rights when an employee's post-injury earnings equal or exceed pre-injury earning capacity, but there is a "significant possibility" that they may decline in the future on account of the injury. *Id.* at 123. This Court's conclusion turns in part on the definition of "disability," § 902(10), and on provisions in § 908(h) that mirror § 910(c), *id.* at 127, precluding any plausible argument that *Rambo II* confines the importance of determining earning capacity with accuracy to the post-injury element of the disability computation.

With respect to *both* elements of that computation, *Rambo II* establishes that there is no reason to compute compensation inaccurately when the record permits an accurate computation and the Act does not mandate inaccuracy. In this case, Price's earning capacity at the time of his retirement in 1998 was known – it was no greater than his actual earnings of $1,156.15 per week, because it had been reduced, permanently, by his previous back injuries. (App. 20) The structure of § 910 requires that the reasonableness and fairness of an average weekly

wage computed under the § 910(a) formula be open to challenge under § 910(c) in any case where the issue is properly raised, because the claimant's earning capacity, before *and* after an injury, is potentially at issue in every case. *Cf. PEPCO*, 449 U.S. at 281-82.

D. The "75 Percent Rule" Is Inconsistent with the Clear Language of the LHWCA and its Legislative History.

In *Johnson*, the District of Columbia Circuit applied the plain meaning of § 910 when it recognized that § 910(c) is not reserved for cases in which neither § 910(a) or (b) applies; to the contrary, it must be used when neither can "reasonably and fairly" be applied. 110 U.S.App.D.C. at 167-68, 290 F.2d at 358-59. Congress did not quantify "reasonably and fairly": there is no "75 percent rule" in the Act. While it may be inferred that a trier of fact, if asked, should consider whether § 910(a) or (b) *can* be applied to compute an average weekly wage before using § 910(c), that is hardly a "presumption," let alone one that bars the trier from considering evidence of the injured employee's actual earning capacity simply because he or she worked 195 days during the year preceding the injury.

Congress knows how to legislate presumptions. The Act conclusively presumes loss of earning capacity in cases of injury to "scheduled" members, § 908(c)(1)-(20), as this Court recognizes. *Rambo II*, 521 U.S. at 126. There is a kind of reverse conclusive presumption in § 908(a) when disability results from the loss of two "scheduled" members. The rebuttable presumptions in § 920 benefit claimants by easing the burden of proving their claims. *See Director, OWCP v. Greenwich Collieries,* 512 U.S. 267, 280

(1994). In the absence of any such statutory support for the "75 percent rule," the Ninth Circuit exceeded its authority when it put § 910(c) off limits to triers of fact, notwithstanding that Congress, by using the open-ended phrase "reasonably and fairly," left its use to the trier's discretion in light of the facts of the specific case.

The legislative history of the LHWCA supports SSA's point. The bill that passed the Senate in 1926, S. 3170, *see* 67 Cong. Rec. 10614 (June 3, 1926), incorporated provisions of the Federal Employees' Compensation Act at § 9(a) and provided, at § 9(b), three methods of determining an average *monthly* wage. *See* S. Rep. No. 69-973, 69th Cong., 2d Sess., at 3 (1926). S. 3170 provided that § 9(b)(3), the precursor of 33 U.S.C. § 910(c), applied if "the methods provided in paragraphs [§ 9(b)(1) and (b)(2)] of this subdivision *are inapplicable in any case.*" *Id.* (Emphasis added) However, after the House held hearings on S. 3170, the bill was reported in 1927, *see* H. R. Rep. No. 69-1767, 69th Cong., 2d Sess., at 6-7 (1927), with the average *weekly* wage provision, redesignated as § 10, that was subsequently enacted into law. *See* 68 Cong. Rec. 5414 (March 2, 1927) for House passage and 68 Cong. Rec. 5909 (March 4, 1927) for Senate passage.

Thus, since its enactment in 1927, the LHWCA has provided that § 910(c) *shall* be used when § 910(a) and (b) "cannot reasonably and fairly be applied." When Congress amended § 910 in 1948, it increased the accuracy of the § 910(a) and (b) formulae by adding the "five-day worker" provisions and the fairness and flexibility available under § 910(c) by providing for consideration of the employee's earning capacity from all sources, including self-employment and employment other than the at-injury employment. *See* S. Rep. No. 80-1315, 80th Cong., 2d

Sess., at 6 (1948); H. R. Rep. No. 80-2095, 80th Cong., 2d Sess., at 8 (1948). Congress understood that § 910(c) applies "to seasonal, intermittent, discontinuous, and *like employment which affords less than a full workyear or workweek.*" *Id.* (Emphasis added)

In his last year of work, Price averaged less than four days of work a week (197 ÷ 52 = 3.79). Congress intended that § 910(c) apply to cases like his. Indeed, if any presumption operates when § 910 is interpreted, it is the presumption that Congress was aware in 1948 of the Ninth Circuit's decision in *Marshall*, 56 F.2d at 78, and that Congress adopted it when it amended § 910 without changing the "reasonably and fairly" clause of § 910(c). *Cf. Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . "); *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74, 85 (1980) (same, discussing LHWCA, 33 U.S.C. § 933(e)).

E. Employment for "Substantially the Whole of the Year" in the At-Injury Employment Does Not Preclude Application of § 910(c).

Price argued below that findings that he worked "substantially the whole of the year" preceding his retirement and that his longshore work was "regular and continuous" are dispositive of the § 910(a) *versus* § 910(c) issue. (*See* App. 11-12, 42-43)

However, § 910(c) may be used even when the § 910(a) formula might otherwise apply: the question, always, is one of reasonableness and fairness. The Ninth Circuit recognized this in *Duncanson-Harrelson Co. v. Director,*

OWCP, 686 F.2d 1336 (CA9 1982), *vacated on other grounds*, 462 U.S. 1101, *decision on remand*, 713 F.2d 462 (1983). Citing authorities, including *Marshall* and *Johnson*, the court observed:

> "[T]he courts have held that even if the worker's employment is permanent and continuous, computation of the average annual wage must be determined pursuant to subsection (c) if (a) or (b) cannot 'reasonably or fairly be implied [*sic*].' 33 U.S.C. § 910(c). (Citations omitted) This can occur when there is insufficient evidence in the record to enable the ALJ to make an accurate computation under subsections (a) or (b), (citations omitted) or when such computation results in excessive compensation of the claimant in light of the injured worker's actual employment record. (Citations omitted)."

686 F.2d at 1342.

In *Matulic*, the Ninth Circuit departed from that settled construction of the LHWCA. The court used the facts and reasoning of *Duncanson-Harrelson*, 686 F.2d at 1343 – application of § 910(a) would improperly provide benefits based on one-third more days than the claimant's decedent worked – to define the outer reach of § 910(c), rather than to exemplify its appropriate use. *Matulic*, 154 F.3d at 1058 ("Today, we draw the line where *Duncanson-Harrelson* left it"). The court dismissed the authority of *Marshall* and *Johnson* by measuring the facts in those cases against its new "75 percent rule" and finding them wanting on grounds not considered in the earlier decisions, *i.e.*, the claimant worked 69 percent of the available work days in *Johnson* and 61 percent in *Marshall*. 154 F.3d at 1057. The court improperly read the key phrase "cannot reasonably and fairly be applied" out of § 910(c) and

substituted its own "75 percent rule" for it. *See Bath Iron Works*, 506 U.S. at 164.

The Ninth Circuit misinterpreted the LHWCA in *Matulic* and repeated its error in this case. This Court should review the Ninth Circuit's decision to establish a uniform and correct construction of the average weekly wage provisions of the Act.

F. The "75 Percent Rule" Distorts the Statutory Scheme.

The courts recognize that the § 910(a) formula results in a "theoretical approximation of what a claimant could ideally have been expected to earn" if he or she had worked "every available work day in the year." *Ingalls Shipbuilding, Inc. v. Wooley*, 204 F.3d at 618. Thus, the formula yields a figure that presumes the injured employee was paid even during vacations, illnesses, strikes, family emergencies, and the like. *See Duncanson-Harrelson*, 686 F.2d at 1342. It was the rigidity and unfairness of that formula in view of the rise of the five-day work week that led Congress in 1948 to amend § 910(a) and (b). *See* S. Rep. No. 80-1315, at 6; H. R. Rep. No. 80-2095, at 7-8.

Paid vacations and holidays were uncommon in 1927. However, union and non-union employees alike now commonly receive them. For example, the collective bargaining agreement in the Pacific Coast longshore industry in which Price was employed provides for paid vacations of up to six weeks, depending on work history and seniority; for thirteen paid holidays every year; and for Pay Guaranty Plan (PGP) payments that guarantee registered longshore workers pay for a 38-hour week if

they report available for work, but no work is available for them. In 2003, the 10,940 registered Pacific Coast longshore workers received, in round numbers, $53,000,000 in vacation pay, $29,900,000 in holiday pay, and $5,400,000 in PGP payments.[7]

The hearing record shows that Price himself was paid for 488 such "non-worked hours" – 61 work shifts – during the last year he worked. During the same time, he was paid for 1,193 hours of actual work. He was in fact paid for the vacations, holidays, and availability for work that the § 910(a) formula theoretically and *additionally* takes into account. However, the "75 percent rule" improperly denies triers of fact the flexibility to consider whether it is reasonable or fair on the facts of the specific case to count non-worked wages twice in computing compensation. If a claimant worked 195 days during the "measuring year" before the injury, that is the end of the matter: the § 910(a) formula applies.

2. The Concurrent Awards Issue.

A. The Ninth Circuit's Construction of § 908(a) Is Contrary to the Uniform Rule in Four Other Judicial Circuits.

The courts of appeals have frequently considered questions arising from concurrent LHWCA compensation awards. All but one of those decisions – the Ninth Circuit's decision in this case – support the policy, derived directly

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[7] *See* Pacific Maritime Association, *2003 Annual Report*, pp. 39-42, 58-64, available at:

http://www.pmanet.org/docs/index.cfm/id_subcat/18/id_content/2142590243 (last visited November 22, 2004).

from § 908(a) and § 908(c), that a claimant must in no event be paid more than the compensation Congress provided for total disability in § 908(a), because a claimant cannot be more than totally disabled.

Under that policy, a claimant who is otherwise entitled to both a "scheduled" partial disability award and a permanent total disability award is denied the "scheduled" award. *See Korineck v. General Dynamics Corp.*, 835 F.2d 42, 44 (CA2 1987) ("Denying additional benefits to one already receiving benefits for total permanent disability serves to avoid double recoveries and accords with the purpose of the statute to provide work benefits for lost earning capacity. Where a worker receives total permanent disability benefits under the statute, that award serves as full replacement for lost earning capacity."); *Rupert v. Todd Shipyards Corp.*, 239 F.2d 273, 276 (CA9 1956) (same). For the same reason, an "unscheduled" permanent partial disability award must be suspended while the claimant receives temporary total disability compensation on account of another injury. *Bunol v. George Engine Co.*, 996 F.2d 67, 69 (CA5 1993) ("[A] party cannot receive temporary total benefits and permanent partial benefits at the same time."). Likewise, when a claimant is entitled simultaneously to "scheduled" and "unscheduled" permanent partial awards, they must not exceed the § 908(a) permanent total rate. *ITO Corp. of Baltimore v. Green*, 185 F.3d 239, 243 (CA4 1999) ("In no case should the rate of compensation for a partial disability, or combination of partial disabilities, exceed that payable to the claimant in the event of total disability. To hold otherwise would be to conclude that the whole may be less than the sum of its parts.").

Price's concurrent compensation awards are for "unscheduled" permanent partial disability and permanent total disability. The Ninth Circuit approved such concurrent awards in *Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419 (CA9 1995), but acknowledged the potential for impermissible "double dipping": "The central problem in this case is that the combined benefits of permanent partial disability and permanent total disability exceed the statutory limit of 33 U.S.C. § 908(a). Brady-Hamilton contends that this amounts to excessive 'double-dipping' and we agree." 58 F.3d at 421. *Brady-Hamilton* follows the District of Columbia Circuit's decision in *Crum v. General Adjustment Bureau*, 238 U.S.App.D.C. 80, 86, 738 F.2d 474, 480 (1984), which held that although the claimant could continue to receive his "unscheduled" fifteen percent permanent partial disability award while he received compensation for permanent total disability, the permanent total award would have to be adjusted, "to account for the fifteen percent partial disability award so that the total compensation did not exceed the statutory limit." *Brady-Hamilton*, 58 F.3d at 422.

However, in this case, notwithstanding *Brady-Hamilton* and *Crum*, the Ninth Circuit followed the District of Columbia Circuit's earlier contrary dictum in *Hastings v. Earth Satellite Corp.*, 202 U.S.App.D.C. 85, 91, 628 F.2d 85, 91, *cert. denied*, 449 U.S. 905 (1980), that concurrent awards are not limited by § 908(a).[8] The Ninth

[8] Nevertheless, *Hastings* recognized that its construction would give rise to "an anomaly, namely, that a twice-injured, permanently disabled worker might receive a larger award than a worker who had become permanently disabled in a single injury." 202 U.S.App.D.C. at 91, 628 F.2d at 91.

Circuit illogically reasoned that because Price's permanent partial disability award could not be "adjusted," *i.e.*, modified under *Rambo I*, no adjustment at all was required and his permanent total award was payable in full. (App. 13-20) To reach that result, the Ninth Circuit had to misread *Crum* (App. 18-19), which would support the Ninth Circuit's decision only if the District of Columbia Circuit had held that the claimant could keep *both* awards in full.

The Ninth Circuit's additional conclusion that § 908(a) limits concurrent compensation awards only when they do not compensate for the "same" disability is just as weak. (App. 13) The controlling policy is plain. *Korineck*, *Rupert*, *Bunol*, and *Green* hold that a claimant cannot be more than totally disabled, so he cannot be compensated for greater than total disability. The Ninth Circuit's contrary reasoning is based on the assumption that Price's earnings would have been greater in 1998 but for the disability resulting from his previous injuries. (App. 13-17) That reasoning has no support in the record, and none whatever in the Act. It is a consideration characteristic of tort law, which plays no role under LHWCA, *see Rambo II*, 521 U.S. at 132-33, a point that the Ninth Circuit inconsistently recognizes in "unscheduled" permanent partial disability cases. *See Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 1150 (CA9 2002). (App. 17-18)

Nothing in § 910 provides that it is permissible to base an injured employee's average weekly wage on what he or she *would have earned* but for a disabling injury in the past. To the contrary, the employee's average weekly wage "at the time of the injury" is the basis for computing compensation. Nothing in § 908(a) or (c) permits compensation to be based on two-thirds of the difference between the employee's post-injury earning capacity, if any, and

what he or she *would have earned*: compensation is based on two-thirds of the difference between the employee's earning capacity following the injury and the average weekly wage preceding it. Under § 908(c), compensation for permanent partial disability, whether "scheduled" or "unscheduled," is *not* payable "in addition to" compensation for permanent total disability, § 908(a), it is only payable "in addition to" compensation for temporary total and temporary partial disability, § 908(b), (e). As the courts uniformly recognize, including the Ninth Circuit prior to this case, § 908(a) is a real limit on the amount of compensation that is payable for disability. *See Korineck*, 835 F.2d at 44; *Rupert*, 239 F.2d at 276.

The $196.01 credit approved by the Benefits Review Board to account for Price's permanent partial award properly implements § 908(a). The Ninth Circuit's flawed reading of § 908(a) rejects the credit and creates a conflict with four other circuits. Only this Court can resolve that conflict. For the reasons stated in Part 1.B of SSA's petition, the Ninth Circuit's decision has the potential to affect a significant portion of the cases that arise under the Act, a consideration that likewise justifies this Court's review.

B. The Ninth Circuit Misconstrued § 906(b)(1).

This issue arose, as the Benefits Review Board recognized, because when it increased Price's average weekly wage from $1,156.15 to $1,525.90, his combined awards correspondingly increased to a sum that exceeded the applicable maximum compensation rate. (App. 47) In reversing the Board and holding that § 906(b)(1) applies separately to each award (App. 21-26), the Ninth Circuit improperly ignored the definitional provisions of the

LHWCA and a controlling rule of interpretation stated by this Court in *PEPCO*.

The Ninth Circuit premised its conclusion on this Court's rule that "identical terms within an Act bear the same meaning," citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. at 479. Therefore, because the phrase "compensation for disability" appears in § 908 and § 919(f) as well as in § 906(b)(1), and § 908 contemplates awards of compensation for *different* kinds of disability, the court reasoned that § 906(b)(1) applies separately to each of Price's concurrent compensation awards. (App. 21-22)

The Ninth Circuit's errors were basic. The court ignored the controlling definitions, from which construction of the LHWCA must flow. *Cf. Rambo II*, 521 U.S. at 122, 126; *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 519 U.S. 248, 257 (1997). "Injury" is defined at § 902(2) as "accidental injury or death arising out of and in the course of employment . . . " "Disability" is defined at § 902(10) as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury . . . " Congress did not define "disability" as "incapacity because of *an* injury" to earn wages, so "disability" as used in the Act may encompass more than one injury. It is therefore contrary to *Cowart*'s "identical terms" rule to construe the phrase "compensation for disability" in § 906(b)(1) differently so that it applies only to a single injury. Price has "disability" resulting from "injury," so § 906(b)(1) limits his compensation in the aggregate. Moreover, § 908 gives meaning to § 906(b)(1) when the definitions in § 902 are read together with it, because it provides that compensation for permanent total disability is *not* payable "in addition to" compensation for permanent partial disability.

The Ninth Circuit also erred by minimizing the "anomaly" it recognized in holding that Price would receive more compensation by becoming totally disabled from two injuries than he would from one. (App. 25) The court justified its holding by relying on the "presumption of legislative acquiescence" and its own assumption that increasing employers' compensation liability encourages workplace safety. (App. 25-26) However, once the court detected the "anomaly," it should have stopped to consider whether "compelling language" in the LHWCA supports its conclusion. *PEPCO*, 449 U.S. at 284. There is in fact no "compelling language" in the provisions that actually pertain to the question, § 902(2), § 902(10), and § 908(c), nor anywhere else in the Act. The court should not have premised a "presumption of legislative acquiescence" on the isolated dictum in *Hastings*, absent any indication that the dictum ever became an established administrative or judicial interpretation of § 906(b)(1). *Compare Lorillard v. Pons*, 434 U.S. at 580-81. Finally, no other court has ever suggested that a restrictive construction of § 906(b)(1) enhances safety. The LHWCA provides at § 941(a) that employers like SSA must "furnish and maintain employment and places of employment which shall be reasonably safe" for its employees, and § 941(b) through (f) subject employers to the safety programs and regulations of the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEVEDORING SERVICES OF AMERICA; HOMEPORT INSURANCE CO., *Petitioners*, v. AREL PRICE; EAGLE PACIFIC INSURANCE COMPANY; DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, *Respondents*.	No. 02-71207 BRB Nos. 01-0632/A 14-108163 14-128687 92-LHCA-2469
AREL PRICE, *Petitioner*, v. STEVEDORING SERVICES OF AMERICA; HOMEPORT INSURANCE CO.; EAGLE PACIFIC INSURANCE COMPANY; DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, *Respondents*.	No. 02-71578 BRB Nos. 01-0632/A 14-108162 14-128687 92-LHC-2469 99-LHC-1653 ORDER AMENDING OPINION AND DENYING PETITION FOR PANEL REHEARING AND PETITION FOR REHEARING EN BANC AND AMENDED OPINION

On Petition for Review of an Order of the
Benefits Review Board

Argued and Submitted
October 10, 2003 – Seattle, Washington

Filed May 11, 2004
Amended August 27, 2004

Before: Stephen S. Trott, Raymond C. Fisher and
Ronald M. Gould, Circuit Judges.

Opinion by Judge Fisher

COUNSEL

John Dudrey, Williams Fredrickson, LLC, Portland, Oregon, for the petitioners and cross-respondents Stevedoring Services of America and Homeport Insurance Company.

Charles Robinowitz, Portland, Oregon, for the respondent and cross-petitioner Arel Price.

Russell A. Metz, Metz & Associates, P.S., Seattle, Washington, for the respondents Stevedoring Services of America and Eagle Pacific Insurance Company.

ORDER

The opinion filed May 11, 2004, is amended as follows:

At slip op. 6000, line 17, after the citation to *ITO Corp. v. Green*, 185 F.3d 239, 243 (4th Cir. 1999), but before the citation to *Rupert v. Todd Shipyards Corp.*, 239 F.2d 273, 276-77 (9th Cir. 1956), add a citation to "*Korineck v. Gen. Dynamics Corp.*, 835 F.2d 42, 43-44 (2d Cir. 1987)."

At slip op. 6004, line 4, insert the following footnote after the sentence that ends with "(25 hours times $48 per hour)":

> Stevedoring and Homeport argue that our reasoning contradicts *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157 (9th Cir. 2002). In *Sestich*, we held that the employee's permanent partial disability award was to be measured based on the difference between his pre-injury average weekly wages and his post-injury wage-earning capacity, rather than the difference between a hypothetical amount the employee could be earning in a different job absent the injury and his post-injury wage-earning capacity. *Id.* at 1160-61. *Sestich* acknowledged, however, that an employee's post-injury wage-earning capacity must be adjusted for inflation and general wage increases to allow for a meaningful comparison to an employee's pre-injury average weekly wage. *Id.* at 1161.
>
> The hypothetical merely takes employee *B*'s pre-injury (before his first injury) average weekly wage of $1000 and adjusts for inflation so that a meaningful comparison can be made to his post-injury (after the first accident) wage-earning capacity of $1200. Another way to understand the inflation adjustment is as follows. Employee *B*'s pre-injury average weekly wage is $1000. The inflation rate in the hypothetical is 192% ($48 divided by $25). Thus, employee *B*'s *inflation-adjusted* pre-injury average weekly wage is $1920 (192% of $1000). Comparing this figure to his post-injury wage-capacity of $1200 reveals that at the time of the second accident employee *B* continues to have a diminished earning capacity as a result of the first accident.

At slip op. 6004, line 17, insert the following paragraph before the paragraph beginning with "In sum,":

> *Crum v. General Adjustment Bureau*, 738 F.2d 474 (D.C. Cir. 1984), is consistent with our conclusion here. In *Crum*, the court rejected the employer's argument that awarding the employee a permanent total disability award after he had already received a permanent partial disability award "would result in compensation for more than 100 percent disability." *Id.* at 478. The court reasoned that the permanent total disability award would be "adjusted so as to take into account the prior award" when "the benefits for a total disability are calculated by evaluating the wage-earning capacity that remains *after* the partial permanent disability." *Id.* at 480.[FN] Contrary to Stevedoring's and Homeport's argument, *Crum* is consistent with the result *Brady-Hamilton* contemplated if on remand the employee's wage-earning capacity was found to have increased: the employee would retain the full amount of both awards, because the second award would be based on the employee's *residual* earning capacity after the first accident.
>
> [FN] Although we use the term "adjustment" in a different sense than the court did in *Crum*, we reach the same conclusion as in *Crum* through similar reasoning. In this case, we use "adjustment" in accordance with the parties' usage – to refer to the credit that the ALJ and Board gave to Stevedoring for ongoing payments under Price's prior permanent partial disability award.

At slip op. 6004, line 26, delete, "Without the prior disability, he would be capable of earning more than he was making at the time of the second injury." Also delete

"Thus," at the beginning of the next sentence and capitalize the "t" in "the."

With these amendments, the panel has voted to deny petitioners' petition for panel rehearing and petition for rehearing en banc, filed June 2, 2004. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc. Accordingly, the petition for panel rehearing and petition for rehearing en banc is DENIED.

OPINION

FISHER, Circuit Judge:

This case requires us to decide the proper method for calculating an injured employee's average annual earnings under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq.* (2001), and to what extent the LHWCA limits an employee's total disability compensation from multiple awards when the employee has received a permanent partial disability award and a subsequent permanent total disability award. We adhere to our holding in *Matulic v. Director, OWCP,* 154 F.3d 1052, 1058 (9th Cir. 1998), that calculating an employee's average annual earnings under 33 U.S.C. § 910(a) does not excessively overcompensate him when he has worked more than 75 percent of the workdays in the year preceding his injury. Furthermore, we hold that when an increase in an employee's average weekly wage between the time of a prior permanent partial disability and subsequent permanent total disability is not caused by a change in his wage-earning capacity, permitting him to retain the full amount of both awards does not result in any "double dipping." We

also hold that 33 U.S.C. § 906(b)(1) delineates the maximum compensation that an employee may receive from each disability award, not from all awards combined.

I. Factual and Procedural Background

On March 27, 1979, Arel Price injured his lower back and elbow when he fell several feet from a broken ladder while working for Stevedoring Services of America ("Stevedoring"). Price was awarded permanent partial disability benefits of $196.01 per week under the LHWCA.[1] SAIF Corporation, the employer's insurance carrier in 1979, is responsible for those benefits. During the year preceding the injury, Price had worked as a longshoreman and a commercial fisherman, earning an average weekly wage of $627.88. Administrative Law Judge Brissenden determined that Price's residual wage-earning capacity after the injury was $333.87 per week.[2] Price returned to work in 1981 as a longshoreman after undergoing decompressive back surgery. He could no longer work as a fisherman because it was too hard on his back, and he was restricted to light jobs as a longshoreman. After another work-related accident in 1991 when a chain fell on him, Price underwent a second decompressive back surgery. Although he returned to work in 1992, Price's back got worse over the years to the point that he was taking pain medication

[1] The 1979 award is not at issue in this case, but the amount of his previous award is relevant in determining the appropriate compensation for Price's present claims.

[2] The award was calculated by subtracting Price's residual wage-earning capacity from his pre-injury average weekly wage: $627.88-$333.87. *See* 33 U.S.C. § 908(c)(21). This yields Price's loss of wage-earning capacity, $294.01, which is multiplied by two-thirds as required by the LHWCA to obtain the award of $196.01. *See id.*

every day on a regular basis. Upon the advice of his doctor, Price stopped working on July 2, 1998.

In October 2000, Administrative Law Judge Vittone ("ALJ") awarded Price permanent total disability benefits as of July 3, 1998. He ordered Homeport Insurance Company ("Homeport"), Stevedoring's insurance carrier in 1998, to pay compensation based on Price's 1998 average weekly wage, which the ALJ calculated to be $1156.15 under 33 U.S.C. § 910(a). The ALJ permitted Price to retain his 1979 permanent partial disability benefits but ruled that 33 U.S.C. § 908(a) limits the combined amount of Price's 1979 and 1998 awards to two-thirds of Price's 1998 average weekly wage, relying on our decision in *Brady-Hamilton Stevedore Co. v. Director, OWCP,* 58 F.3d 419 (9th Cir. 1995).

The Benefits Review Board ("Board") determined that Price's 1998 average weekly wage was $1525.90, not $1156.15, due to an error in the ALJ's method of calculation under § 910(a).[3] The Board affirmed the ALJ's decision

[3] To determine Price's 1998 average weekly wage, the ALJ took Price's actual earnings in the preceding year $60,119.97 and divided by 52 weeks to get an average weekly wage of $1156.15. However, the Board noted that under § 910(a) the ALJ should have taken Price's actual earnings, $60,119.97, and divided by the number of days Price actually worked, 197, to get his average daily wage of $305.18. *See* 33 U.S.C. § 910(a). Then, the ALJ should have multiplied Price's average daily wage by 260 because Price was a five-day worker to get his average annual earnings of $79,346.80. *See id.* Finally, the ALJ should have divided Price's average annual earnings by 52 to obtain an average weekly wage of $1525.90. *See id.* § 910(d). The parties do not dispute that the calculation of Price's average weekly wage under § 910(a) yields a figure of $1525.90, not $1156.15. However, they dispute whether § 910(a) should govern the calculation of Price's average weekly wage. *See infra* at 5997-99 [sic].

in all other respects. Specifically, with respect to the maximum limit, the Board stated, "[C]oncurrent awards combined cannot exceed 66 2/3 percent of [a] claimant's average weekly wage at the time of the second injury." Applying this limit to Price's case, the Board concluded, "As claimant is entitled to two-thirds of his 1998 average weekly wage as compensation for his permanent total disability, Homeport's liability will be reduced by the amount of the ongoing permanent partial disability payments, as otherwise claimant would receive[] more than that allowed under Section 8(a)."[4]

In their petition for review, Stevedoring and Homeport contend that the ALJ and Board applied the wrong statutory provision to calculate Price's 1998 average weekly wage. In his cross-petition, Price argues that Homeport is not entitled to any credit for SAIF's payments to Price.[5] We conclude that the ALJ and Board properly applied § 910(a) to calculate Price's 1998 average weekly wage but erred in reducing Price's 1998 award by the amount of SAIF's payments under his 1979 award.

II. STANDARD OF REVIEW

The Board must accept the ALJ's findings of fact if they are supported by "substantial evidence." 33 U.S.C. § 921(b)(3); *Container Stevedoring Co. v. Director, OWCP,* 935 F.2d 1544, 1546 (9th Cir. 1991). We conduct an independent

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[4] "Section 8(a)" refers to the section of the LHWCA itself, which was codified at 33 U.S.C. § 908(a).

[5] Homeport and Price have raised other challenges to the ALJ's and Board's decisions, which we address in a separate memorandum filed contemporaneously with this opinion.

review of the administrative record to determine if the Board adhered to this standard. *Bumble Bee Seafoods v. Director, OWCP,* 629 F.2d 1327, 1329 (9th Cir. 1980). The Board's interpretation of the LHWCA is a question of law reviewed de novo and is not entitled to any special deference. *Stevedoring Servs. of Am. v. Director, OWCP,* 297 F.3d 797, 801-02 (9th Cir. 2002). We respect the Board's interpretation, however, if it "is reasonable and reflects the underlying policy of the statute." *Kelaita v. Director, OWCP,* 799 F.2d 1308, 1310 (9th Cir. 1986).

III. PRICE'S 1998 AVERAGE ANNUAL EARNINGS

Stevedoring and Homeport claim that the ALJ and Board erred in calculating Price's 1998 average weekly wages. An employee's "average weekly wages" are computed by dividing the claimant's "average annual earnings" by 52 weeks. 33 U.S.C. § 910(d)(1). There are three methods for calculating a claimant's average annual earnings.

Under the method prescribed in § 910(a), the ALJ would first divide the actual earnings of the claimant during the 52 weeks preceding the injury by the number of days actually worked by the claimant in that period to obtain the claimant's "average daily wage." *Id.* § 910(a); *see Matulic v. Director, OWCP,* 154 F.3d 1052, 1055-56 (9th Cir. 1998). Next, the ALJ would multiply the average daily wage by either 260 if the claimant is a five-day worker or 300 if the claimant is a six-day worker to get the claimant's "average annual earnings." 33 U.S.C. § 910(a). Section 910(b) uses a similar formula but computes the claimant's average daily wage based on the earnings of a typical worker in the same class engaged in similar

employment in the same general location, rather than the claimant's actual earnings. *See id.* § 910(b). In contrast, § 910(c) has no fixed algorithm. Instead, it requires the ALJ to establish a figure that "shall reasonably represent the annual earning capacity" of the claimant. *Id.* § 910(c).

The ALJ and the Board used § 910(a) to calculate Price's 1998 average annual earnings. Stevedoring and Homeport argue that the ALJ and Board should have applied § 910(c) rather than § 910(a). Section 910(a) applies when the claimant "worked in the employment in which he was working at the time of the injury . . . during substantially the whole of the year immediately preceding his injury." *Id.* § 910(a). Section 910(b) applies when the claimant did not work in that employment during "substantially the whole of such year." *Id.* § 910(b). Only if § 910(a) and (b) "cannot reasonably and fairly be applied" does § 910(c) apply. *Id.* § 910(c); *see Matulic,* 154 F.3d at 1056.

The presumption is that § 910(a) or (b) applies rather than § 910(c). *See Matulic,* 154 F.3d at 1057. However, sections 910(a) and (b) cannot reasonably and fairly be applied when employment in the industry is "casual, irregular, seasonal, intermittent, and discontinuous," *Marshall v. Andrew F. Mahony Co.,* 56 F.2d 74, 78 (9th Cir. 1932); when applying sections 910(a) and (b) would result in "excessive compensation" in light of the injured worker's actual employment record, *Duncanson-Harrelson Co. v. Director, OWCP,* 686 F.2d 1336, 1342 (9th Cir. 1982), *vacated on other grounds,* 462 U.S. 1101 (1983); or when there is insufficient evidence in the record to enable the ALJ to make an accurate calculation under sections 910(a) and (b), *id.*

Determining Price's 1998 average annual earnings under § 910(a) would not result in excessive compensation. In *Matulic* we announced a bright line rule that "when a claimant works more than 75% of the workdays of the measuring year the presumption that § 910(a) applies is not rebutted." 154 F.3d at 1058. Here, the ALJ found that Price worked 197 days during the 52 weeks preceding his 1998 total disability. Because Price is a five-day worker, there are 260 total working days in the measuring year. 33 U.S.C. § 910(a). That means Price worked 75.77 percent of the measuring year (197 divided by 260). Price falls near the line that *Matulic* drew but clearly within it. Therefore, calculating Price's 1998 average weekly wage under § 910(a) "falls well within the realm of theoretical or actual 'overcompensation' that Congress contemplated," and the presumption that § 910(a) applies is unrebutted. *Matulic,* 154 F.3d at 1058.

Stevedoring and Homeport argue, however, that § 910(a) should not apply because "Price's employment was intermittent and casual." A determination of whether employment is casual, irregular, seasonal, intermittent and discontinuous must be "based on the nature of the employment and of the industry itself, not merely on the prior work record of a particular claimant." *Palacios v. Campbell Indus.,* 633 F.2d 840, 843 (9th Cir. 1980). Employment in an industry is casual, irregular, seasonal, intermittent and discontinuous when there are fixed, determinable periods of inactivity during the year. *See Marshall,* 56 F.2d at 77, 79 (upholding application of § 910(c) rather than § 910(b) where a "fixed condition" incident to the employment was that "from the middle of May until the fore part of August the work was slack"); *Strand v. Hansen Seaway Serv., Ltd.,* 614 F.2d 572, 573-76

(7th Cir. 1980) (holding that § 910(c) rather than § 910(a) applied where the port was closed from December through March because of climatic conditions). When there are fixed, determinable periods of inactivity during the year, section 910(a) or (b) cannot reasonably and fairly be applied because the nature of the employment is such that it cannot afford a full year of work as sections 910(a) and (b) presume. *See* S. Rep. No. 80-1315 (1948), *reprinted in* 1948 U.S.C.C.A.N. 1979, 1982 ("[Subsection (c)] is used where the employment itself, in which the injured employee was engaged when injured, does not afford a full year of work.").

The ALJ's finding that Price's employment was not intermittent and casual is supported by substantial evidence in the record. The record shows that Price's work through the union hiring hall fluctuates in the sense that Price does not always "work the same number of days every week" and "some years are better than other years." However, the flow of work in most employment can wax and wane; this alone does not equate to fixed, determinable periods of inactivity that would prevent § 910(a) from being reasonably and fairly applied. Therefore, the ALJ and Board properly applied § 910(a) to calculate Price's 1998 average weekly wage.

IV. Maximum Limit on Concurrent Awards

A. Double recovery

Stevedoring and Homeport argue that if Price's 1998 permanent total disability award is not reduced by the amount of his 1979 permanent partial disability award, his concurrent awards would amount to "double dipping" because his combined compensation would exceed the level

of compensation for permanent total disability. Section 908(a) prescribes the amount of compensation for permanent total disability: "In case of total disability adjudged to be permanent 66 2/3 percentum of the average weekly wages shall be paid to the employee during the continuance of such total disability." 33 U.S.C. § 908(a). Absent any double dipping, an employee who sustains more than one type of disability may receive more than one award. *See Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 91 (D.C. Cir. 1980). Double dipping occurs when a disability award compensates an employee for a loss of earning capacity that is accounted for in another award. *See ITO Corp. v. Green*, 185 F.3d 239, 243 (4th Cir. 1999); *Korineck v. Gen. Dynamics Corp.*, 835 F.2d 42, 43-44 (2d Cir. 1987); *Rupert v. Todd Shipyards Corp.*, 239 F.2d 273, 276-77 (9th Cir. 1956). If an employee sustains multiple injuries from a *single* accident, the rule against double dipping precludes the employee from receiving a permanent partial disability award in addition to a permanent total disability award because the latter "presupposes a permanent loss of *all* earning capacity." *Rupert*, 239 F.2d at 276-77 (emphasis added). Complexities arise, however, when the employee has suffered a prior partial disability and is subsequently totally disabled, because the permanent total disability award may be based on a *diminished* earning capacity resulting from the prior injury.

In *Brady-Hamilton*, we applied § 908(a) to limit awards paid concurrently to a longshoreman who had sustained a permanent partial disability followed by permanent total disability. *See Brady-Hamilton*, 58 F.3d at 421. In that case, Anderson earned an average weekly wage of $435.93 before his first injury that resulted in permanent partial disability. By the time of his totally

disabling injury four years later, Anderson's average weekly wage had increased to $674.72. The Board found that Anderson's higher wages were due to an increase in wage rates and not an increase in Anderson's wage-earning capacity.[6] The Board held that "permanent partial and permanent total disability awards are not permitted in cases where the claimant is shown to have an increase in wage earning capacity following the first injury." *Id.* We did not disagree with the Board's holding but vacated the Board's ruling because it improperly "made its own finding of fact on the cause of Anderson's higher earnings," which the ALJ had not addressed. *Id.* at 422. We remanded the case to the Board to instruct "the ALJ to determine the cause of Anderson's increased earnings and make whatever adjustments necessary to insure that the combined disability award does not exceed the statutory limit mandated by Congress." *Id.*

We implicitly recognized that the amount of adjustment needed, if any, depended on the factual determination of the cause of the employee's increase in earnings between the time of his first and second injury. If an employee's increase in earnings is not caused by a change in his wage-earning capacity, allowing the employee to retain the full amount of both awards does not result in any double dipping. The reason is that the prior partial disability award compensates the employee for the reduction in his wage-earning capacity from the first accident,

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[6] "[H]igher wages do not necessarily prove an increase in wage-earning capacity." *Metropolitan Stevedore Co. v. Rambo,* 515 U.S. 291, 301 (1995) ("*Rambo I*"). A change in wage-earning capacity includes "a change in [the employee's] physical condition, skill level, or the availability of suitable jobs." *Metropolitan Stevedore Co. v. Rambo,* 521 U.S. 121, 130 n.3 (1997) ("*Rambo II*").

and the subsequent permanent total disability award compensates the employee for what remains of his earning capacity after that accident. *See Hastings,* 628 F.2d at 91. Taken together, the awards do not compensate the employee for more earning capacity than he has actually lost. In comparison, a double dipping problem would arise if a change in conditions since the first accident has mitigated or eliminated the prior injury's negative economic effect on the employee's ability to earn wages. In that case, because the first award overestimated the effect of the first injury on the employee's wage-earning capacity, combining the full amounts of the first and second award would end up compensating the employee for more wage-earning capacity than he has actually lost.

The following hypotheticals will illustrate why this is so. Suppose employee *A* works 40 hours per week at a wage of $25 per hour. His average weekly wage would be $1000.[7] The worker then suffers a permanent partial disability that restricts the number of hours that he is physically capable of working to 25 hours per week, reducing his earning capacity to $625 per week. His diminution in earning capacity is $375 ($1000-$625). Consequently, he would be entitled to a permanent partial disability award of $250 per week (two-thirds of $375). *See* 33 U.S.C. § 908(c)(21). Ten years later, he is in actuality no longer physically restricted by his disability to working 25 hours per week and now works more hours than he did

[7] Assuming that the employee works an eight-hour day, his average daily wage would be $200 (8 times $25). Multiplying his average daily wage by 260 yields his average annual earnings of $52,000. *See* 33 U.S.C. § 910(a). Dividing his average annual earnings by 52 produces his average weekly wage of $1000. *See id.* § 910(d)(1).

before his first injury, 48 hours per week, at the same wage rate. His average weekly wage would be $1200. A second accident then occurs, causing permanent total disability. As a result, he would be entitled to a permanent total disability award of $800 per week (two-thirds of $1200). *See id.* § 908(a). His two awards combined would total $1150 ($250 plus $800).

However, $1150 would overcompensate the employee by $250. The $250 partial disability award is designed to compensate the employee for his supposed $375 loss in earning capacity from the first accident, but his $1200 average weekly wage prior to the second accident also reflects that "lost" earning capacity because, since the first accident, he has recovered his physical ability to work 40 or more hours per week. Thus, the permanent total disability award would compensate the employee for a $375 loss in earning capacity that is already compensated by the prior permanent partial disability award. Under these circumstances, the employee's combined compensation of $1150 should be reduced by $250 (two-thirds of $375) to avoid double dipping.

Now compare a hypothetical employee *B* who is similarly situated to *A*. Like *A*, employee *B* starts out with an average weekly wage of $1000 and suffers a $375 diminution in earning capacity due to the first injury. Then his average weekly wage increases to $1200 prior to his second injury. *B's* combined awards would be the same as *A's:* $250 for the permanent partial disability and $800 for the permanent total disability. Unlike *A*, however, *B* has not experienced an increase in wage-earning capacity between the two injuries. He continues to be restricted by his disability to working 25 hours per week. However, his average weekly wage has risen between the time of his

first and second injury because wage rates have increased from $25 to $48 per hour due to inflation.[8]

In this second scenario, there is no double dipping because employee *B's* $1200 average weekly wage in the year preceding his second injury still reflects a diminished earning capacity due to his previous partial disability. Had he not suffered a prior partial disability, he would be capable of earning $1920 at the higher wage rate (40 hours times $48 per hour) rather than $1200 (25 hours times $48 per hour).[9] The first injury continues to affect adversely *B's*

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[8] These hypotheticals merely illustrate the clear cases of what constitutes a change in wage-earning capacity and what does not. An employee's wage-earning capacity can change without a change in the employee's physical condition, *see Rambo I,* 515 U.S. at 301, and an employee's wage-earning capacity may remain the same despite an increase in actual wages for reasons other than inflation. "There may be cases raising difficult questions as to what constitutes a change in wage-earning capacity, but we need not address them here." *Id.*

[9] Stevedoring and Homeport argue that our reasoning contradicts *Sestich v. Long Beach Container Terminal,* 289 F.3d 1157 (9th Cir. 2002). In *Sestich,* we held that the employee's permanent partial disability award was to be measured based on the difference between his pre-injury average weekly wages and his post-injury wage-earning capacity, rather than the difference between a hypothetical amount the employee could be earning in a different job absent the injury and his post-injury wage-earning capacity. *Id.* at 1160-61. *Sestich* acknowledged, however, that an employee's post-injury wage-earning capacity must be adjusted for inflation and general wage increases to allow for a meaningful comparison to an employee's pre-injury average weekly wage. *Id.* at 1161.

The hypothetical merely takes employee *B*'s pre-injury (before his first injury) average weekly wage of $1000 and adjusts for inflation so that a meaningful comparison can be made to his post-injury (after the first accident) wage-earning capacity of $1200. Another way to understand the inflation adjustment is as follows. Employee *B*'s pre-injury average weekly wage is $1000. The inflation rate in the hypothetical is 192% ($48 divided by $25). Thus, employee *B*'s *inflation-adjusted* pre-injury average weekly wage is $1920 (192% of $1000). Comparing this

(Continued on following page)

ability to earn wages at the time of his second injury. Consequently, his $800 permanent total disability award does not compensate him for any loss in wage-earning capacity that is already compensated by the prior $250 permanent partial disability award. The $250 permanent partial disability award is designed to compensate him for his $375 diminution in earning capacity resulting from the first injury, and the $800 permanent total disability award compensates him for his residual earning capacity of $625, which translates into higher nominal dollars at the time of the second accident due to inflation. Because there is no double dipping, no adjustment to either award is required.

Crum v. General Adjustment Bureau, 738 F.2d 474 (D.C. Cir. 1984), is consistent with our conclusion here. In *Crum*, the court rejected the employer's argument that awarding the employee a permanent total disability award after he had already received a permanent partial disability award "would result in compensation for more than 100 percent disability." *Id.* at 478. The court reasoned that the permanent total disability award would be "adjusted so as to take into account the prior award" when "the benefits for a total disability are calculated by evaluating the wage-earning capacity that remains *after* the partial permanent disability." *Id.* at 480.[10] Contrary to Stevedoring's and

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figure to his post-injury wage-capacity of $1200 reveals that at the time of the second accident employee *B* continues to have a diminished earning capacity as a result of the first accident.

[10] Although we use the term "adjustment" in a different sense than the court did in *Crum*, we reach the same conclusion as in *Crum* through similar reasoning. In this case, we use "adjustment" in accordance with the parties' usage – to refer to the credit that the ALJ and Board gave to Stevedoring for ongoing payments under Price's prior permanent partial disability award.

Homeport's argument, *Crum* is consistent with the result *Brady-Hamilton* contemplated if on remand the employee's wage-earning capacity was found to have increased: the employee would retain the full amount of both awards, because the second award would be based on the employee's *residual* earning capacity after the first accident.

In sum, when an employee's earnings have increased between the time of a prior permanent partial disability and subsequent permanent total disability, permitting him to retain the full amount of both awards does not result in any double dipping if the employee's increase in earnings were not caused by a change in wage-earning capacity.[11] There is no double dipping because the employee's permanent total disability award is based on a diminished earning capacity resulting from the previous partial disability. Without the prior disability, he would be capable of earning more than he was making at the time of the second injury. Thus, the permanent total disability award does not compensate the employee for any loss in wage-earning capacity that is already compensated by the prior permanent partial disability award.

Here, Price's average weekly wage increased from $627.88 to $1525.90 over a span of almost 20 years from 1979 to 1998. The fact that Price's 1998 average weekly

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[11] We do not suggest that if the employee's wage-earning capacity has changed, there would necessarily be a double dipping problem. There may be cases in which the employee's earning capacity has changed in some way, yet the employee's prior injury continues to have a negative economic effect on his ability to earn wages. It suffices for present purposes to note that if the employee's wage-earning capacity has *not* changed, no danger of double dipping exists.

wage exceeds the nominal value of his 1979 average weekly wage does not alone determine whether concurrent awards would constitute double recovery. That determination depends in part on the cause or causes of the increase in earnings. The ALJ found that Price's increase in earnings was not due to an increase in wage-earning capacity, a finding that was not challenged before the Board or before this court. Because of the ALJ's finding, the Board recognized that "there is no basis for reducing the 1979 award," but it went on to conclude that "it is the second [1998] award that must be reduced to avoid over-compensation." This conclusion was erroneous because an employee is not over-compensated when the employee's increase in earnings is not caused by an increase in wage-earning capacity. Because Price's wage-earning capacity did not change between the time of his 1979 and 1998 awards, permitting Price to retain the full amount of both awards would not double-compensate him for any loss in wage-earning capacity. The ALJ and Board therefore erred in reducing Price's 1998 award by the amount of his 1979 award.

B. Maximum compensation under § 906(b)(1)

In addition to limiting Price's total compensation under *Brady-Hamilton,* the Board held that the combined amount of Price's awards also could not exceed the maximum compensation rate under 33 U.S.C. § 906(b)(1). Section 906(b)(1) states, "Compensation for disability or death . . . shall not exceed an amount equal to 200 per centum of the applicable national average weekly

wage. . . . " 33 U.S.C. § 906(b)(1).[12] Price contends that § 906(b)(1) demarcates the maximum amount of *each* of his awards individually, not the total amount of both awards after they are combined. We agree.

The difference in interpretations is demonstrated by the numbers. At the time of Price's 1998 injury, 200 percent of the national average weekly wage was $835.74. *See* Division of Longshore and Harbor Workers' Compensation, U.S. Dep't of Labor, National Average Weekly Wages, Minimum and Maximum Compensation Rates, and Annual October Increases ("National Average Weekly Wage Tables"), *at* http://www.dol.gov/esa/owcp/dlhwc/NAWWinfo.htm (last visited Apr. 19, 2004). Under the Board's decision, Price's combined compensation of $1213.28 from both awards ($196.01 plus $1017.27) would be limited to a total of $835.74.[13] In contrast, under Price's interpretation, his 1998 award of $1017.27 would be limited to $835.74. However, he would receive the full amount of his 1979 award of $196.01 because it falls below the $835.74 maximum, and his combined compensation from both awards would be $1031.75 ($196.01 plus $835.74).

To determine which is the proper interpretation of the LHWCA, we look first to its plain language. *Bowen v. Director, OWCP,* 912 F.2d 348, 351 (9th Cir. 1990). Section 906(b)(1) refers to "[c]ompensation for disability," but does not specify whether it is referring to compensation from *an* award or rather from *all* awards. However, Congress used

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[12] The Secretary of Labor determines the national average weekly wage annually. *See* 33 U.S.C. § 906(b)(3).

[13] Price's maximum compensation would not be fixed at $835.74 but rather would change annually with changes in the national average weekly wage. *See* 33 U.S.C. § 906(c).

the phrase "compensation for disability" elsewhere in the LHWCA when referring to compensation from a single award. "[I]dentical terms within an Act bear the same meaning." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992). For example, § 919(f) says, "*An award* of compensation for disability may be made after the death of an injured employee." 33 U.S.C. § 919(f) (emphasis added). In addition, § 908 states, "Compensation for disability shall be paid to the employee as follows. . . . " It then identifies four different types of disability and prescribes the amount of compensation for each type.[14] If an employee suffers more than one type of disability, he may receive multiple awards under § 908, subject to the rule against double recovery, discussed previously. *See Hastings*, 628 F.2d at 91. Thus, § 908

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[14] Specifically, § 908 reads:

> Compensation for disability shall be paid to the employee as follows:
>
> (a) Permanent total disability: In case of total disability adjudged to be permanent 66 2/3 per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. . . .
>
> (b) Temporary total disability: In case of disability total in character but temporary in quality 66 2/3 per centum of the average weekly wages shall be paid to the employee during the continuance thereof.
>
> (c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66 2/3 per centum of the average weekly wages. . . .
>
> (e) Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury. . . .

33 U.S.C. § 908.

delineates the amount of "compensation for disability" that shall be paid under *an* award for each type of disability. Therefore, we construe the same phrase in § 906(b)(1) to refer to the maximum compensation allowed from *an* award, not all awards to an employee.

The legislative history buttresses the conclusion that § 906(b)(1) is not an overall limitation on all disability awards given to an employee for multiple, successive injuries. Prior to 1972, the maximum compensation rate under § 906(b)(1) was fixed at $70 per week. In 1972 Congress amended § 906(b)(1) to resemble its current form by pegging the maximum compensation rate to a multiple of the national average weekly wage. *See* Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 ("1972 Amendments"), Pub. L. No. 92-576, sec. 5(a), 86 Stat. 1251, 1252.[15] In describing the general purpose of the amendments, the House Report stated, "It is important to note that adequate workmen's compensation benefits are not only essential to meeting the needs of the injured employee and his family, but, by assuring that the employer bears the cost of unsafe conditions, serves to strengthen the employer's incentive to provide the fullest

[15] The 1972 version of § 906(b)(1) provided a phase-in period to ease the adjustment of the increase in the maximum amount of benefits. *See* 1972 Amendments, sec. 5(a); H.R. Rep. No. 92-1441 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4698, 4700. During this phase-in period, the maximum compensation rate was gradually increased each year from 125% of the national average weekly wage in 1973 to 200% of the national average weekly wage by 1975. *See* 1972 Amendments, sec. 5(a). In 1984, Congress simplified the provision to its current form, setting the cap at 200% of the national average weekly wage and extending the limitation to death benefits. *See* Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, sec. 6, 98 Stat. 1639, 1642.

measure of on-the-job safety." H.R. Rep. No. 92-1441 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4698, 4699. The Committee also noted that, historically, an employee's compensation award was subject to the § 906(b)(1) limitation "in order to protect against a high compensation payment for injuries to highly paid workers." *Id.* at 4700.

Although serving this latter purpose, the Board's interpretation of § 906(b)(1) contravenes a more fundamental purpose of the 1972 Amendments. If § 906(b)(1) were read to restrict the total compensation that an employee can receive from all awards, the LHWCA would fail to provide employers an incentive to ensure the safety of a formerly injured employee who is already receiving an award that meets the § 906(b)(1) amount. For example, suppose employee *D* earns an average weekly wage of $4500 per week. He is injured in July 1998 and suffers a $3000 loss in earning capacity due to a permanent partial disability. His award would be $2000 (two-thirds of $3000) absent any statutory maximum. *See* 33 U.S.C. § 908(c)(21). However, § 906(b)(1) would limit his compensation to $835.74 (200 percent of the prevailing national average weekly wage). *See* National Average Weekly Wage Tables. Later that year, the employee is totally disabled in a second accident. He would receive a second permanent total disability award of $1000 (two-thirds of his residual earning capacity of $1500), absent the statutory maximum; but under the Board's interpretation of § 906(b)(1), the employer does not have to pay a penny more for the second accident because the employee is already receiving $835.74 in weekly payments from the first award. Consequently, the employer does not bear the costs of the unsafe conditions that caused the second accident.

On the other hand, reading § 906(b)(1) to limit only the amount of compensation from each disability award will still accomplish the purpose of protecting employers against a "high compensation payment for injuries to highly paid workers," H.R. Rep. No. 92-1441, *reprinted in* 1972 U.S.C.C.A.N. at 4699, because the provision would treat a highly paid employee who earns an average weekly wage over 300 percent of the national average weekly wage as if he earns a lower average weekly wage.[16] At the same time, an employer would have an incentive under § 906(b)(1) to prevent future injuries to formerly injured employees because the employer bears some liability for future accidents. For example, in our previous hypothetical, the employer would have to pay $835.74, but not $1000 based on the employee's true earnings, for the second accident. Thus, the employer would bear some cost for the unsafe conditions that engendered the second accident, although not as much as without the § 906(b)(1) limit.

Our interpretation of § 906(b)(1) is consistent with those of other circuits. In *Hastings v. Earth Satellite Corp.*, 628 F.2d 85 (D.C. Cir. 1980), the D.C. Circuit posited in dicta that § 906(b)(1) imposes a ceiling on each disability award given to an employee who has been injured successively, rather than all awards combined. *See id.* at 91. The court acknowledged that this interpretation "might give rise to an anomaly, namely, that a twice-injured, permanently disabled worker might receive a larger award than

[16] An employee who earns over 300% of the national average weekly wage would be limited by § 906(b)(1) to compensation of 200% of the national average weekly wage (two-thirds of 300% is equal to 200%).

a worker who had become permanently disabled in a single injury." *Id.* For instance, our hypothetical employee *D* would receive $1671.48 if he were injured twice and only $835.74 if he were totally disabled in a single accident. Nevertheless, the court concluded, "This specter does not indicate a flaw in the system of concurrent awards; rather, it is caused by the existence of the Act's maximum-payment provisions. Congress is free to amend the statute to eliminate the resulting anomaly." *Id.* When Congress subsequently amended § 906(b)(1) in 1984, it did not alter the provision's language in such a way as to eliminate the resulting "anomaly" or otherwise cast doubt on the propriety of the D.C. Circuit's interpretation. *See* Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, sec. 6, 98 Stat. 1639, 1642. On the contrary, as we have explained, that an employer may pay more to a permanently disabled worker for injuring him twice than to a worker who has become totally disabled in a single injury is consistent with Congress' intent to provide incentives for employers to ensure on-the-job safety.

We hold that § 906(b)(1) defines the maximum compensation from each award, not from all awards combined. This conclusion is consistent with the plain language of the LHWCA and effectuates the underlying policy of the act by shielding employers from high compensation payments for injuries to highly paid workers while providing employers an incentive to prevent future injuries to formerly injured employees. The Board erroneously applied § 906(b)(1) to limit the total, combined amount of Price's permanent partial disability award and subsequent permanent total disability award.

Costs on appeal shall be awarded to Price and be borne equally by Homeport and Eagle Pacific Insurance Company.

Petition GRANTED. AFFIRMED in part and REVERSED in part.

[SEAL]

U.S. Department of Labor Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB Nos. 01-0632
and 01-0632A

AREL PRICE Claimant-Respondent Cross-Petitioner v. STEVEDORING SERVICES OF AMERICA and HOMEPORT INSURANCE COMPANY Employer/Carrier-Petitioners Cross-Respondents EAGLE PACIFIC INSURANCE COMPANY Carrier-Respondent	PUBLISHED DATE ISSUED: APR 30, 2002 DECISION and ORDER

Appeals of the Decision and Order and Decision and Order On Reconsideration of John M. Vittone, Chief Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

John Dudrey (Williams Fredrickson, L.L.C.), Portland, Oregon, for Stevedoring Services of America/Homeport Insurance Company.

Russell A. Metz (Metz & Associates, P.S.), Seattle, Washington, for Stevedoring Services of America/Eagle Pacific Insurance Company.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Stevedoring Services of America/Homeport Insurance Company (Homeport) appeals, and claimant cross-appeals, the Decision and Order and Decision and Order on Reconsideration (92-LHC-2469, 99-LHC-1653) of Chief Administrative Law Judge John M. Vittone rendered on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This case involves issues stemming from injuries claimant sustained in 1991 and 1998 while employer was insured by two different carriers. In 1979, claimant fell off a ladder, had decompressive back surgery at L4-5, and was off work for two years. Homeport EX 14 at 88. Following this injury, claimant performed light duty work at Longview Port, Washington. Claimant filed a claim for the 1979 injury and received a permanent partial disability award based on a loss of wage-earning capacity of $294.02 per week. *See Price v. Brady-Hamilton Stevedore Co.*, 31 BRBS 91 (1996); Homeport EX 53 at 304. Claimant subsequently obtained his jobs through a union hiring hall off the dock

preference board which offered priority dispatch to employment in a limited category of jobs such as slingman and gang boss. The first back injury at issue here took place on October 2, 1991, while claimant was working as a ship lasher. Tr. at 56. Dr. Berkeley, a neurosurgeon, performed decompressive surgery at L5-S1 on April 21, 1992. CX 9 at 114. Claimant continued to experience symptoms related to this injury and Dr. Berkeley performed an anterior cervical diskectomy and fusion at C6-7. EX 23 at 338. Eagle Pacific Insurance Company (Eagle Pacific), employer's carrier at the time of the 1991 injury, paid claimant temporary total disability compensation from October 3, 1991, to November 21, 1992, and all medical benefits for that injury. Dr. Berkeley released claimant for work with restrictions. CX 9 (Dr. Berkeley Depo.) at 117-118. Claimant testified that he tried to get sling jobs and dock jobs after this injury, that he last worked for employer as a gang boss, and that the pain in his back gradually increased in 1996, to which he responded by increasing his level of medication. Tr. at 62-63, 71, 86. Eventually, Dr. Berkeley recommended that claimant retire and claimant stopped working on July 2, 1998. EX 23 at 341.

In his decision, the administrative law judge found that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920, presumption linking his degenerative back condition to his employment and that employer did not establish rebuttal of the Section 20(a) presumption. The administrative law judge found claimant entitled to temporary total disability benefits for the 1991 injury from October 3, 1991, until November 23, 1992, while Eagle Pacific was on the risk. The administrative law judge determined that Homeport is liable as the responsible carrier for the 1998 injury, finding that claimant

sustained an aggravation of his injury in 1998 while Homeport was on the risk, and that claimant is entitled to permanent total disability benefits for that injury beginning on July 3, 1998, based on an average weekly wage of $1,156.15, calculated under Section 10(a), 33 U.S.C. §910(a). Finding that the permanent partial disability award for the 1979 injury remains payable, the administrative law judge awarded Homeport a credit for the amount by which the combined awards exceed the compensation allowable under Section 8(a), 33 U.S.C. §908(a), pursuant to *Brady-Hamilton Stevedoring Co. v. Director, OWCP,* 58 F.3d 419, 29 BRBS 101(CRT) (9th Cir. 1995).

On appeal, Homeport argues that the administrative law judge erred in finding that claimant's work while Homeport was on the risk aggravated his back condition and that therefore it is liable for total disability benefits as the responsible carrier, and that the administrative law judge erroneously determined claimant's average weekly wage for the 1998 injury under Section 10(a), rather than Section 10(c). Claimant cross-appeals, alleging that the administrative law judge erred in denying him a permanent partial disability award for his 1991 injury and challenging the average weekly wage determination for the 1991 injury. Claimant also contends that the administrative law judge improperly calculated claimant's average weekly wage for the 1998 injury, and that the judge erred in his finding regarding Homeport's entitlement to a credit if the combined awards for the 1979 and 1998 injuries exceed 66 2/3 percent of claimant's average weekly wage at the time of the 1998 injury. Eagle Pacific has filed response briefs to both appeals, urging affirmance of the administrative law judge's decision.

We first address claimant's contention that the administrative law judge erred in finding that he had no additional loss of wage-earning capacity after he returned to work following the 1992 surgeries. Claimant maintains that he could not perform catwalk jobs available on the dock preference board which he performed prior to his 1991 injury, and that as a result he missed 22 days of work per year between 1993 and July 2, 1998. Tr. at 64-66. Claimant alleges that the 22 days lost amount to 176 hours over 52 weeks, or 3.38 hours per week, which translates into $49.08 per week in compensation.

Under Section 8(c)(21), an award for permanent partial disability is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21), (h). The administrative law judge found that there was no documentary evidence to support claimant's allegation regarding this time loss, as claimant did not submit into evidence the time books he allegedly kept, and that claimant's testimony was confusing and contradictory. In his 1999 deposition claimant stated that he could not handle catwalk jobs but said he worked as much after the surgery as prior to it, and he did not allege a loss of wage-earning capacity following the 1991 injury prior to the hearing. Homeport EX 58 at 474; Cl. Sept.27, 1999 Depo. at 42. The administrative law judge also observed that claimant testified that jobs for longshoremen have increased, as there are fewer longshoremen and more work opportunities, and that the number of hours claimant worked in 1996 and 1997 were comparable to the number of hours he worked in 1990 (prior to the 1991 injury). Thus, the administrative lawjudge found that the evidence does not

support a conclusion that claimant had a loss of wage-earning capacity as a result of refusing catwalk jobs.

We affirm the administrative law judge's denial of a permanent partial disability award following claimant's return to work in 1992. The burden is on claimant to show a loss of wage-earning capacity. Thus, claimant's argument that no party objected to his time books not being submitted into evidence or the administrative law judge's never asking for them is rejected. Moreover, it was within the administrative law judge's discretion to consider claimant's increased post-injury earnings resulting from increased work opportunities at the port. *See generally Sproull v. Stevedoring Services of America*, 25 BRBS 100 (1991), *aff'd in pert. part sub nom. Sproull v. Director, OWCP,* 86 F.3d 895, 30 BRBS 49(CRT)(9th Cir. 1996), *cert. denied,* 520 U.S. 1155 (1997); *see also Deweert v. Stevedoring Services of America*, 272 F.3d 1241, 35 BRBS 120(CRT) (9th Cir. 2001). The administrative law judge also acted within his discretion in rejecting claimant's testimony due to its contradictory nature. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied,* 440 U.S. 911 (1979). Therefore, as it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant had no loss of wage-earning capacity as a result of the 1991 injury.[1] *See Price,* 31 BRBS 91.

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[1] As we affirm the administrative law judge's finding that claimant is not entitled to a permanent partial disability award for the 1991 injury, we need not address claimant's contention that the finding by an administrative law judge in an earlier proceeding that his wage-earning capacity after the 1979 injury was $333.87, constitutes the law of the case with respect to a determination of his average weekly wage in this case for purposes of the 1991 injury.

Claimant next contends that the administrative law judge should, in the alternative, have awarded him at least a nominal award as of November 23, 1992. A claimant is entitled to nominal compensation when his work-related injury has not diminished his present wage-earning capacity, but there is a significant potential of future economic harm due to the injury. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). In his order on reconsideration, the administrative law judge denied a nominal award.[2] The administrative law judge found that claimant continued to work without any physical complaints or medical visits for a number of years while his earnings continued to increase. He thus concluded that the evidence did not support claimant's assertion of a significant possibility of future economic harm. This finding is supported by the record. Moreover, although claimant eventually became disabled in 1998, this claim was based on a new injury. Claimant sought a nominal award only after this disability occurred, at which point such an award could not serve the purpose noted in *Rambo* of holding open the Section 22, 33 U.S.C. §922, statute of limitations for the 1991 injury. *See id.* Therefore, the administrative law judge's denial of a nominal award is affirmed.

With regard to the 1998 injury, in its appeal, Homeport first argues that claimant's work as a gang boss while it was on the risk did not aggravate his back condition, as

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[2] In denying a nominal award, the administrative law judge first noted that claimant did not request such an award until after his decision was issued. Such an award, however, is encompassed within a claim for a greater partial disability award. *See Rambo v. Director, OWCP*, 81 F.3d 840, 30 BRBS 27(CRT) (9th Cir. 1996), *vacated and remanded on other grounds*, 521 U.S. 121 (1997).

claimant did not establish that working conditions existed which aggravated his back condition. This issue is related to Homeport's contention that it is not the responsible carrier for claimant's permanent total disability, as that determination also involves whether an aggravation occurred. Section 20(a) of the Act provides claimant with a presumption that his condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition.[3] *See Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

The determination of the responsible carrier in the case of multiple traumatic injuries, turns on whether the claimant's condition is the result of the natural progression or the aggravation of a prior injury. If the claimant's disability resulted from the natural progression of the initial injury, then the carrier at the time of that injury is responsible for compensating the claimant for the entire disability. If there is a second injury which aggravated, accelerated or combined with the earlier injury, resulting in the claimant's disability, the carrier at the time of the second injury is liable for all medical expenses and compensation related thereto. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir.

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[3] Homeport argues that claimant has to show that his undeniably light work independently worsened his condition. Reply Memo at 11. Claimant, however, only has to show that his work could have aggravated his condition, at which point the burden shifts to employer to establish that it did not. *See Rajotte v. General Dynamics Corp.*, 18 BRBS 85, 86 (1986).

1986); *Buchanan v. Int'l Transp. Serv.,* 33 BRBS 32 (1999), *aff'd mem.*, No. 99-70631, 2001 WL 201498 (9th Cir. Feb. 26, 2001) (unpub.); *see also Delaware River Stevedores v. Director,* 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002). "The key under this formulation is determining which injury ultimately resulted in the claimant's disability." *Kelaita,* 799 F.2d at 1311. Each employer or carrier bears the burden of persuading the factfinder, by a preponderance of the evidence, that the claimant's disability is due to the injury with the other employer or carrier. *See Buchanan,* 33 BRBS at 35-36.

In finding that working conditions existed that could have aggravated claimant's back condition, the administrative law judge relied on Dr. Berkeley's opinion that claimant's back disability is attributable to an industrial injury. Decision and Order at 18. Homeport argues that the videotapes it submitted purporting to convey the work of a slingman do not support Dr. Berkeley's opinion that claimant's working conditions could have caused his degenerative back problems. Employer contends that the administrative law judge did not express an opinion about the videotapes, and that therefore his crediting of Dr. Berkeley's opinion over that of Dr. Vessely is not rational. The administrative law judge did refer to the tapes several times in his summary of the evidence, Decision and Order at 5, 15, and thus did not neglect to consider them. With regard to his job duties, claimant testified that as a gang boss he routinely relieved slingmen for up to four hours per day and that the videotapes did not accurately convey all aspects of the tasks he had to perform. Tr. at 87, 203-204. Dr. Berkeley deposed that claimant described his duties to him, and that over the course of claimant's medical examinations he discussed the details of his work

as slingman and gang boss. Dr. Berkeley also showed an awareness of claimant's job duties. CX 9 at 109-110, 140. Thus, as Dr. Berkeley's opinion and claimant's testimony regarding his job duties constitute substantial evidence to support the administrative law judge's finding that claimant's working conditions after 1992 could have aggravated his degenerative back condition, we hold that the administrative. law judge properly invoked the Section 20(a) presumption based on evidence that claimant has a degenerative back condition and Dr. Berkeley's opinion that working conditions could have caused or aggravated this condition. Therefore, claimant established a *prima facie* case for invocation of the Section 20(a) presumption. *See Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2nd Cir. 2001).

Homeport next argues that even if claimant established his *prima facie* case, it has rebutted the presumption by virtue of Dr. Vessely's testimony that the kind of work claimant performed as a slingman and gang boss would not contribute to the degenerative process in claimant's back. Upon invocation of the presumption the burden shifts to employer to present substantial evidence that claimant's condition was not caused or aggravated by his employment. *See American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. *See O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). If the administrative law judge finds that the Section 20(a) presumption is

rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See id; Director, OWCP v. Greenwich Collieries,* 512 U.S. 257, 28 BRBS 43(CRT) (1994). Where the aggravation of a condition is alleged, employer must establish that claimant's condition was not caused or aggravated by his employment in order to rebut the Section 20(a) presumption. *See Conoco, Inc. v. Director, OWCP,* 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

The administrative law judge found that Homeport did not establish rebuttal of the Section 20(a) presumption. Dr. Vessely testified that the work of a slingman, as he understood it from watching two videotapes, EXs 60, 61, and reading a job analysis prepared by Mr. Weiford, a vocational counselor, EXs 44, 45, would not cause or "add" to degenerative changes in the lumbar spine. Tr. at 122, 123, 125. His opinion indicates that claimant's work did not aggravate his condition, and it is arguably sufficient to rebut the Section 20(a) presumption. *See Duhagon,* 31 BRBS 98.

Any error in this regard is harmless, however, as, in discussing the issue of aggravation based on the record as a whole, the administrative law judge rejected employer's allegation that claimant's work could not aggravate or lead to the progression of a degenerative condition in the lumbar spine, stating, "Dr. Berkeley *credibly* stated that Claimant's back disability is wholly attributable to an industrial injury." Decision and Order at 19 (emphasis added). The administrative law judge credited Dr. Berkeley's opinion on the grounds that he was claimant's treating physician, and examined him on numerous occasions, as opposed to Dr. Vessely who examined claimant only

once. The administrative law judge also found Dr. Berkeley's opinion to be well-reasoned.[4] Decision and Order at 23. The administrative law judge reasoned that when Dr. Berkeley released claimant in 1992, after performing surgery, claimant was essentially symptom-free until 1996, and had no debilitating symptoms from either his neck or low back injuries. CX 9 at 117-118. Dr. Berkeley reported that the daily subliminal trauma of claimant's work activities during the two to three years prior to July 1998 hastened the need for surgery and development of the degenerative condition. *Id.* at 132, 138-139, 141-142; Eagle Pacific EX 23 at 344. As the administrative law judge rationally credited Dr. Berkeley, substantial evidence supports his finding of a causal relationship between claimant's degenerative condition and his employment.

We therefore affirm the administrative law judge's finding that claimant sustained an aggravating injury in the years before July 1998. Accordingly, the conclusion that Homeport is the responsible carrier is also affirmed. We reject the contention that since, according to Dr. Berkeley, any activity would cause pressure on claimant's nerve, and therefore pain, claimant's current condition is the result of the natural progression of claimant's degenerative condition, rather than an aggravation of claimant's

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[4] For the reasons stated in *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195, 201 n.6 (2001), we reject the argument that the administrative law judge erred in citing *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999), in weighing the medical evidence, and in according Dr. Berkeley's opinion determinative weight on the basis that he is claimant's treating physician.

condition.[5] Dr. Berkeley's statement that claimant's condition would have progressed even in the absence of longshoring work is not inconsistent with his conclusion that claimant's work accelerated the deterioration of his condition.[6] The "aggravation rule" encompasses work events which accelerate the effects of a prior condition. *See Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993). The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge which are supported by the record. *See, e.g., Burns v. Director, OWCP,* 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Goldsmith v. Director, OWCP,* 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). In this case, the administrative law judge provided valid reasons for finding Dr. Berkeley's opinion persuasive on the issue of aggravation. As the opinion of Dr. Berkeley constitutes substantial evidence to support the administrative law judge's determination that Homeport is liable as the responsible carrier because it was on the risk in 1998 when claimant sustained the last aggravation of his condition, and Homeport

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[5] Homeport asserts that the administrative law judge did not address an exhibit in which Dr. Berkeley stated that claimant became permanently totally disabled on July 3, 1998, and wrote that illness began, or the disabling injury occurred first in 1979, and then on October 2, 1991. Homeport EX 4 at 4. This is not inconsistent with Dr. Berkeley's opinion that claimant's post-1992 work hastened the need for surgery and hastened the deterioration of his degenerative back condition, as the last was a cumulative aggravation type injury.

[6] Dr. Berkeley used athletes as an example of the manner in which strenuous activity accelerates wear and tear on the body which would occur normally with aging. CX 9 at 138-139. Contrary to Homeport's argument, he did not equate claimant's job with the intensity of the athletic activities he cites.

has failed to establish error in the administrative law judge's weighing of the conflicting testimony, his determination that Homeport is liable as the responsible carrier is affirmed. *Foundation Constructors,* 950 F.2d 621, 25 BRBS 71 (CRT); *Kelaita,* 799 F.2d 1308; *Abbott v. Dillingham Marine & Manufacturing Co.,* 14 BRBS 453 (1981), *aff'd mem sub nom. Willamette Iron & Steel Co. v. Director, OWCP,* 698 F.2d 1235 (9th Cir. 1982).

Homeport next contends that although the administrative law judge's actual calculation of claimant's average weekly wage as $1,156.15, was correct, he erred in determining it under Section 10(a), rather than Section 10(c), because claimant worked on a rotational basis out of a hiring hall and the employment in the port where claimant worked was intermittent. Claimant contends that the administrative law judge correctly utilized Section 10(a) to determine his average weekly wage, but appeals the calculation under that subsection.

Section 10(a), 33 U.S.C. §910(a), looks to the actual wages of the injured worker who is employed for substantially the whole year prior to the injury as the monetary base for the determination of the amount of compensation, and is premised on the injured employee's having worked substantially the entire year prior to the injury.[7] *Duncanson-Harrelson*

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[7] Section 10(a) states:

> If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall

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Co. v. Director, OWCP [Freer], 686 F.2d 1336 (9th Cir. 1982), *vacated and remanded on other grounds,* 462 U.S. 1101 (1983), *decision after remand,* 713 F.2d 462 (9th Cir. 1983). Section 10(c) of the Act, 33 U.S.C. §910(c), is a catch-all provision to be used in instances when neither Section 10(a) nor Section 10(b), 33 U.S.C. §910(b), can be reasonably and fairly applied.[8] *See National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979).

The administrative law judge first rejected Homeport's assertion that claimant is bound by his pre-hearing contention that his average weekly wage is $1,156.15, calculated under Section 10(c). The administrative law judge also rejected Homeport's assertion that *Marshall v. Andrew F. Mahony Co.,* 56 F.2d 74 (9th Cir. 1932), rather than *Matulic v. Director, OWCP,* 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998), is controlling in this case. The administrative law judge found that Section 10(a) applies because claimant worked 197 days during the 52 weeks before July 2, 1998, that he was a five-day-per-week worker, and that he therefore worked 75.7 percent of 260 days, which, under *Matulic,* requires application of Section 10(a). The administrative law judge found that employment at the Port of Longview, Washington, was not seasonal or intermittent, but rather was stable and continuous; he found no evidence that the Port was closed seasonally or periodically. Decision and Order at 29. Dividing claimant's actual earnings in the year prior to the

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have earned in such employment during the days when so employed.

33 U.S.C. §910(a).

[8] No party argues that Section 10(b) is applicable in this case.

injury, $60,119.97, by 52, the administrative law judge arrived at an average weekly wage of $1,156.15.

We reject employer's contention that the administrative law judge was required to calculate claimant's average weekly wage pursuant to Section 10(c). In *Matulic,* 164 F.3d 1052, 32 BRBS 148(CRT), the United States Court of Appeals for the Ninth Circuit held that Section 10(a) must be applied to calculate average weekly wage when the claimant worked 75 percent or more of the workdays in the year preceding the injury, if the number of days worked is known. In *Marshall,* 56 F.2d 74, the Ninth Circuit affirmed the District Court's application of Section 10(c), as the evidence established that the claimant's work was irregular and intermittent and Sections 10(a) and (b) thus could not be fairly applied in such a case. Application of subsection (a) or (b) in such a case would result in an average weekly wage well in excess of what the claimant could have earned. *Id.* at 78. Indeed, in *Matulic,* the court noted that the claimant in *Marshall* worked only 61 percent of available work days. *Matulic,* 154 F.3d at 1057, 32 BRBS at 151(CRT). By setting the threshold for application of Section 10(a) at 75 percent of available days,[9] the court in *Matulic* stated that any "overcompensation" that would result from application of Section 10(a) would not be "unfair." The Court stated that Section 10(c) "may not be invoked in cases in which the only significant evidence that the application of [Section 10(a)] would be unfair or unreasonable is that claimant worked more than 75 percent of the days in the year preceding his injury."

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[9] The court, however, did not preclude the use of Section 10(a) where the claimant works fewer than 75 percent of available days. 154 F.3d at 1058, 32 BRBS at 152(CRT).

Matulic, 154 F.3d at 1058-1059, 32 BRBS at 152(CRT). In this case, employer's sole contention is that claimant did not work every day because a ship was not in port every day. This assertion is insufficient to establish the inapplicability of Section 10(a) in view of the fact that claimant worked over 75 percent of available work days and the administrative law judge's specific finding that work at the Port was not intermittent. Therefore, the administrative law judge properly applied *Matulic* to the facts of this case, and his conclusion that claimant's average weekly wage should be calculated under Section 10(a) is affirmed.

A calculation under Section 10(a) is made by determining the total income claimant earned in the 52 weeks preceding the work injury, dividing that sum by the actual number of days claimant worked, multiplying by 260 (for a five day per week worker as here), and dividing that number by 52. *See Universal Maritime Corp. v. Moore,* 126 F.3d 256, 31 BRBS 119 (CRT) (4th Cir. 1997); 33 U.S.C. §910(a), (d). No party disputes the administrative law judge's finding that claimant's earnings during the 52 weeks before his 1998 injury, between July 3, 1997, and July 2, 1998, were $60,119.97. Decision and Order at 30; Homeport EX 9 at 57-63. Claimant worked 197 days during this period. *Id.* The administrative law judge in this case did not, however, determine an average daily wage as is required under Section 10(a), and multiply that figure by 260 to obtain claimant's annual earning capacity, which is then divided by 52 under Section 10(d)[10] *See*

[10] Claimant is correct in asserting that "wages" include holiday pay, vacation pay and guaranteed pay. *See* 33 U.S.C. §902(13); *Sproull v. Stevedoring Services of America,* 25 BRBS 100 (1991), *modified on other grounds sub nom. Sproull v. Director, OWCP,* 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied,* 520 U.S. 1155 (1997);

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Moore, 126 F.3d 256, 31 BRBS 119(CRT); *Wooley v. Ingalls Shipbuilding, Inc.,* 33 BRBS 88, *aff'd,* 204 F.3d 615, 34 BRBS 12(CRT) (5th Cir. 2000). As this computation can be made based on the administrative law judge's findings, we modify his decision to reflect an average weekly wage of $1,525,90.[11]

We now address claimant's argument that the administrative law judge erred in stating that Homeport may be entitled to a credit if claimant's permanent partial and permanent total disability awards exceed the maximum allowable compensation pursuant to Section 8(a), 33 U.S.C. §908(a). Claimant contends such a credit would reduce his permanent total disability award due to the loss of the full benefit of the Section 10(f) adjustments due. Where a claimant sustains an injury which results in permanent partial disability and subsequently suffers a second injury which results in permanent total disability, he may receive concurrent awards for the two disabilities. *See Hastings v. Earth Satellite Corp.,* 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980), *cert. denied,* 449 U.S. 905 (1980); *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989). The concurrent awards combined cannot exceed 66 2/3 percent of claimant's average weekly wage at the time of the second injury. *Brady-Hamilton Stevedore Co. v. Director, OWCP,* 58 F.3d 419, 29 BRBS 101(CRT) (9th Cir. 1995); *Hansen v. Container*

Siminiski v. Ceres Marine Terminals, 35 BRBS 136 (2001). The $60,119.97, which the administrative law judge found that claimant earned the year before his 1998 injury, includes holiday, vacation and PGP pay. *See* Decision and Order at 30-31.

[11]Annual earnings of $60,119.67 divided by 197 equals an average daily wage of $305.18. $305.18 x 260 = $79,346.80 ÷ 52 = $1,525.90.

Stevedoring Co., 31 BRBS 155 (1997). The administrative law judge determined that claimant is entitled to the continuing permanent partial disability award against SAIF for the 1979 injury, and that if the combination of the partial and total awards combined exceed two-thirds of claimant's average weekly wage at the time of the 1998 injury, Homeport is entitled to a credit for the amount exceeding the maximum compensation allowable under Section 8(a). The administrative law judge specifically found that claimant's increased average weekly wage in 1998 was not the result of an increase in wage-earning capacity, and this finding is not challenged. Thus, there is no basis for reducing the 1979 award, *see Morgan v. Marine Corps Exch.*, 14 BRBS 784, 791 (1982), *aff'd mem.*, 718 F.2d 1111 (9th Cir. 1983), *cert. denied,* 465 U.S. 1012 (1984), and it is the second award that must be reduced to avoid over-compensation. *Brady-Hamilton,* 58 F.3d 419, 29 BRBS 101(CRT). As claimant is entitled to two-thirds of his 1998 average weekly wage as compensation for his permanent total disability, Homeport's liability will be reduced by the amount of the ongoing permanent partial disability payments, as otherwise claimant would received [sic] more than that allowed under Section 8(a).

Claimant challenges Homeport's credit on the basis that it could reduce the full amount of the cost-of-living adjustment to which he is entitled for his permanent total disability award. Section 10(f) provides for annual cost-of-living adjustments, effective October 1 of each year, to the compensation payable for permanent total disability. 33 U.S.C. §910(f); *Bowen v. Director, OWCP,* 912 F.2d 348, 24 BRBS 9(CRT) (9th Cir. 1990). The fact that Homeport will be able to offset a portion of its ongoing liability does not affect claimant's entitlement to annual adjustments under

Section 10(f). It is undisputed that claimant is entitled to permanent total disability compensation for the second injury, and he is entitled to Section 10(f) adjustments on that award. The fact that under *Brady-Hamilton,* Homeport receives a credit for the concurrent award does not affect the amount upon which the Section 10(f) adjustment is due. The amount of claimant's entitlement is not affected by the source from which payment is made. Claimant is entitled to two-thirds of his average weekly wage, plus Section 10(f) adjustments on that amount, as compensation for his permanent total disability, for which Homeport is the responsible carrier. Once claimant's entitlement is determined, Homeport is allowed to offset a portion of its liability by the amount of the ongoing permanent partial disability award. Thus, we hold that claimant is entitled to receive the full amount of the Section 10(f) adjustments on his permanent total disability award in calculating the amount which is then subject to a credit for the permanent partial disability award pursuant to *Brady-Hamilton.*[12]

Accordingly, the administrative law judge's average weekly wage determination is modified to $1,525.90 for the reasons stated in this opinion. The administrative law judge's decisions are also modified to reflect claimant's

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[12] As we have modified the average weekly wage to a higher figure, claimant's compensation rate may exceed the statutory maximum, 33 U.S.C. § 906(b). If so, claimant's entitlement will be further limited to the applicable maximum compensation rate under Section 6(b), and Homeport will be liable for that amount less the amount of the permanent partial disability award. In other words, claimant's combined awards cannot exceed the amount prescribed for total disability under Section 8(a), plus Section 10(f) adjustments, nor can they exceed the statutory maximum under Section 6(b).

entitlement to annual Section 10(f) adjustments on his permanent total disability award, prior to the application of any credit due Homeport. In all other regards, the administrative law judge's Decision and Order and Decision and Order On Reconsideration are affirmed.

SO ORDERED.

/s/ Nancy S. Dolder
NANCY S. DOLDER, Chief
Administrative Appeals Judge

/s/ Roy P. Smith
ROY P. SMITH
Administrative Appeals Judge

/s/ Betty Jean Hall
BETTY JEAN HALL
Administrative Appeals Judge

U.S. Department of Labor **[SEAL]**

Employment Standards Administration
Office of Workers' Compensation Programs
Division of Longshore and
Harbor Workers' Compensation
Washington, D.C. 20210

File Number:

SEP 22, 2004

John Dudrey
Williams Fredrickson LLC
1515 Southwest Fifth Avenue, Suite 844
Portland, OR 97201-5447

Re: Stevedoring Services of America, et al. v. Arel Price
CA No. 02-71207

Dear Mr. Dudrey:

In response to your inquiry dated September 17, 2004, the following is the data for new claims filed under the LHWCA and its extensions for Fiscal Year 2003, and for the first three quarters of Fiscal Year 2004.

Period	Total Claims	District 13	District 14	District 15	District 18
FY 2003	20154	750	1949	750	2556
FY 2004 Through 3rd Qtr	16343	537	1492	608	2216

Should you require further information, please do not hesitate to contact this office.

Sincerely

/s/ Michael Niss
Michael Niss
Director, Division of
Longshore and Harbor
Workers' Compensation

Working for America's Workforce

RELEVANT STATUTORY PROVISIONS

Longshore and Harbor Workers' Compensation Act (LHWCA), § 6(b)(1), 33 U.S.C. § 906(b)(1):

> Compensation for disability or death . . . shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage, as determined by the Secretary under paragraph (3).

LHWCA, § 8(a), § 8(c)(21), 33 U.S.C. § 908(a), § 908(c)(21):

> Compensation for disability shall be paid to the employee as follows:
>
> (a) Permanent total disability: In case of total disability adjudged to be permanent 66 2/3 per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.
>
> (c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66 2/3 per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subsection (b) or subsection (e) of this section, respectively, and shall be paid to the employee, as follows:
>
> (21) Other cases: In all other cases in the class of disability, the compensation shall be 66 2/3 per

centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability.

LHWCA, § 10(a), § 10(c), 33 U.S.C. § 910(a), § 910(c):

Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

(b) [Omitted]

(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in

the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

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